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In The
Supreme Court of the United States
October Term, 1990

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, ET AL.

and

JESSE OLIVER, ET AL.,

Petitioners,

v.

JIM MATTOX, ET AL.,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does Section 2 of the Voting Rights Act, 42 U. S. C. 1973, apply to dilution claims in judicial election systems?

LIST OF ALL PARTIES

Plaintiffs:

League of United Latin American Citizens (Statewide)
LULAC Local Council 4434
LULAC Local Council 4451
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Gene Collins
Al Price
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Harris County:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty

Dallas County:

Jesse Oliver
Fred Tinsley
Joan Winn White

Defendants:

William P. Clements, Governor, State of Texas (Dismissed
prior to trial)
Jim Mattox, Attorney General of Texas
George Bayoud, Secretary of State
Texas Judicial Districts Board

LIST OF ALL PARTIES - (Continued)

Thomas R. Phillips, Chief Justice, Texas Supreme Court
 Mike McCormick, Presiding Judge, Court of Criminal Appeals
 Ron Chapman, Presiding Judge, 1st Admin. Judicial Region
 Thomas J. Stovall, Jr., Presiding Judge, 2nd Admin. Judicial Region
 James F. Clawson, Jr., Presiding Judge, 3rd Admin. Judicial Region
 John Cornyn, Presiding Judge, 4th Admin. Judicial Region
 Robert Blackmon, Presiding Judge, 5th Admin. Judicial Region
 Sam B. Paxson, Presiding Judge, 6th Admin. Judicial Region
 Weldon Kirk, Presiding Judge, 7th Admin. Judicial Region
 Jeff Walker, Presiding Judge, 8th Admin. Judicial Region
 Ray D. Anderson, Presiding Judge, 9th Admin. Judicial Region
 Joe Spurlock II, President, Texas Judicial Council,
 Leonard E. Davis

Defendant-Intervenors:

Judge Sharolyn Wood (Harris County)

Judge Harold Entz (Dallas County)

Bexar County:

Judge Tom Rickoff

Judge Susan D. Reed

Judge John J. Specia, Jr.

Judge Sid L. Harle

Judge Sharon Macrae

Judge Michael D. Pedan

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the League of United Latin American Citizens, et al., and Jesse Oliver, et al., pray that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Fifth Circuit, *en banc*.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas has not been reported, but is included in the Appendix.¹ The opinion of a panel of the United States Court of Appeals for the Fifth Circuit is reported at 902 F. 2d 293 (5th Cir. 1990). The order granting rehearing en banc (*sua sponte*) is reported at 902 F. 2d 322 (5th Cir. 1990). The opinion of the United States Court of Appeals for the Fifth Circuit, *en banc*, is reported at 914 F. 2d. 620 (5th Cir. 1990), and reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, provides as follows:

- (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure

¹ All references to the Appendix refer to the Appendix filed in No. 90-813, *Houston Lawyers' Assn., et al. v. Jim Mattox, et al.* The Houston Lawyers' Assn. was a plaintiff-intervenor in the case before the district court, as were Jesse Oliver, et al. who are joining petitioners League of United Latin American Citizens, et al. in this petition.

shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b(f)(2), provides, in pertinent part, as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides, in pertinent part, as follows:

Whenever a State or political subdivision with respect to which the prohibitions set forth in

section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other

appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with the section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provision of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

The Proceedings Below

This is a voting rights case brought by Black and Hispanic citizens of and organizations within the State of Texas. Suit was filed in the United States District Court for the Western District of Texas under the Voting Rights Act, 42 U.S.C. 1973, and under 42 U.S.C. 1983, alleging

violations of the Fourteenth and Fifteenth Amendments to the United States Constitution. Jurisdiction below was based upon 28 U.S.C. 1331.

At issue is the at-large method of electing district judges.² The challenge was limited to nine metropolitan counties (Harris, Dallas, Bexar, Tarrant, Travis, Lubbock, Midland, Ector, and Jefferson counties) out of Texas' 254 counties; however, the challenge included 172 (44%) of the state's then 375 district judges.

After a trial to the Court, the district judge entered findings of fact and conclusions of law, and found a violation of Section 2 of the Voting Rights Act in all nine counties. (Appendix, at pp. 183a-304a) The Court did not find that the 1985 Amendment to the Texas Constitution allowing a county to sub-divide itself for purposes of election of district judges was motivated by discriminatory intent. Finding of Fact No. 36, and Conclusions of Law Nos. 22-23. (Appendix, at pp. 282a-283a; 301a-302a)

In each county challenged, the trial court found for plaintiffs on each of the threshold *Gingles* factors, *Thornburg v. Gingles*, 478 U. S. 30 (1986):

- the minority group was sufficiently concentrated so as to constitute a voting age majority in a single member district, (Appendix, at pp. 200a-209a), and
- the minority group voted cohesively, (Appendix, at pp. 210a-275a), and

² In Texas, the trial court of general jurisdiction is the district court. *Texas Constitution*, Art. 5, Sec. 8.

- a white voting bloc usually defeated the choice of the minority voters. (Appendix, at pp. 210a-275a).

In addition, the trial court found that voting in these counties was racially polarized, (Appendix, at pp. 210a-275a), and that there was a lack of success of minority candidates. (Appendix, at pp. 279a-281a). As required, it made findings regarding the "typical factors," (Appendix, at pp. 275a-285a) as discussed in the *Senate Report*, No 97-417, 97th Congress 2d Sess., reprinted in 1982 *U. S. Code Cong. & Admin. News* at pp. 177 et seq., which is a part of the legislative history of the 1982 amendments to the Voting Rights Act.

Finally, based upon the "totality of the circumstances," the trial court found that minority voting strength was diluted in each of the targeted counties. (Appendix, at pp. 297a-301a).

Although given an opportunity to do so, the Texas Legislature failed to remedy the discriminatory at-large election system. Therefore, on January 2, 1990, the trial court enjoined further use of the at-large electoral system in these counties. Pursuant, in part, to an agreement between the plaintiffs and the Attorney General for the State of Texas, it ordered a non-partisan, interim election plan under which the counties were sub-divided into districts coincident with existing electoral boundaries for state representatives, or county commissioners, or justice of the peace precincts. On January 11, 1990, this interim plan was stayed by the United States Court of Appeals for the Fifth Circuit pending appeal.

On May 11, 1990, that court reversed the district court, holding 2-1 that trial judges occupy single-member offices which are incapable of being further sub-divided. 901 F. 2d 293 (5th Cir. 1990). Four days later, pursuant to a majority vote of the active judges, a rehearing *en banc* was ordered, and on September 28, 1990, the *en banc* court reversed the trial court in a severely split opinion. 914 F. 2d 620 (5th Cir. 1990). (Appendix, at pp. 1a-182a).

The majority opinion, written by J. Gee, (Appendix, at pp. 1a-35a), held that even though an intentional discrimination claim under the Fourteenth and Fifteenth Amendments to the U. S. Constitution could be maintained for judicial elections, and even though Section 5 of the Voting Rights Act applies to judicial elections, and even though some elements of Section 2 apply to judicial elections, the amended Section 2 of the Voting Rights Act which incorporates a "results test" does not allow a vote dilution claim against a judicial election system, regardless of how discriminatory it may be.³ They specifically overruled a prior opinion of that court to the contrary, *Chisom v. Edwards*, 839 F. 2d 1056 (5th Cir. 1988), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988).⁴

³ The findings of the district court, (Appendix, at pp. 183a-304a), undisturbed on appeal, establish that minority voters in the targeted Texas counties are unable to elect judges of their choice.

⁴ *Chisom v. Roemer*, as the case is now called, is also before this Court on Petition for Writ of Certiorari, No. 90-797. *Chisom* involves the Louisiana Supreme Court. *LULAC* involves Texas trial judges. The Higginbotham concurrence in this case, 914 F. 2d 634-651, raises the issue of whether Section 2 of the Voting Rights Act covers the election of appellate state court judges but not trial judges. It is incumbent upon this Court to fully resolve the issue of Section 2 applicability to judicial elections.

One concurring opinion, written by J. Higginbotham, (Appendix, at pp. 47a-114a), following *Chisom*, supported the prior panel opinion in *LULAC* that although Section 2 of the Voting Rights Act covers judicial elections, there is an exception to coverage for trial judges based upon the concept that a single-member office is not amenable to further division.

The dissent, written by J. Johnson, (Appendix, at pp. 115a-182a), author of the *Chisom* opinion, strongly urged that all sections of the Voting Rights Act are applicable to all judicial elections, and that the minority vote dilution proved at trial should be remedied. He characterized the majority opinion as "dangerous" and a "burning scar on the flesh of the Voting Rights Act." (Appendix, at p. 116a).

Statement of Facts

Judicial districts are created by statute. District judges are elected in the targeted counties in county wide,⁵ partisan elections, but each judicial candidate must file for a specific court, a numbered post, e. g. the 254th District Court. Each of the targeted judicial districts is county wide, with the exception of the 72nd Judicial District, which covers two counties.

Qualifications for office are set by the Texas Constitution and by statute. *Texas Const.*, Art. 5, Sec. 7. To become

⁵ The Texas Constitution requires judicial districts to be no smaller than a county unless authorized by a majority of the voters in the county. *Texas Const.*, Art. 5, Sec 7a(i). To date, no election under this provision has been held.

the party nominee for a numbered judicial post, a candidate must receive a majority of the votes cast, *Texas Elec. Code*, Sec. 172.003; however, in the general election, a plurality determines the winner. *Texas Elec. Code*, Sec. 2.001. A district judge's term is four years, and such terms are staggered in multi-judge counties.

Although a district judge usually sits in the county from which he/she is elected, jurisdiction of any district court is statewide. *Nipper v. U-Haul Co.*, 516 S.W.2d 467, 470 (Tex. Civ. App. 1974). Venue is determined by a complex set of statutes. *Texas Civil Practice & Remedies Code*, Ch. 15.

Minority electoral success has been minimal. A review of the targeted counties reveals the following:

County	No. of Judges	No. of Minority Judges	Total Population	Percent Minority ⁶
Harris	59	3 (5%)	2,409,544	19.7%
Dallas	37	2 (5%)	1,556,549	18.5%
Tarrant	23	2 (9%)	860,880	11.8%
Bexar	19	5 (26%)	988,800	46.6%
Travis	13	0 (0%)	419,335	17.2%
Jefferson	8	0 (0%)	250,938	28.2%
Lubbock	6	0 (0%)	211,651	27.1%
Ector	4	0 (0%)	115,374	25.9%
Midland	3	0 (0%)	82,636	23.5%

⁶ "No. of Minority Judges" and "Percent Minority" here refer only to the ethnic or racial group on whose behalf a case was presented to the district court. For example, in Dallas County, there were 2 Black judges and one Hispanic judge at time of trial, and Blacks were 18.5% and Hispanics were 9.9% of the total population; however, a case was presented only on behalf of Blacks.

The above chart presents data as of the time of trial in September, 1989. Perhaps more revealing of the lack of minority access is the fact that in Harris County only two Blacks have defeated whites in seventeen contested judicial elections. In Dallas County, only two Blacks have won out of seven contests. Bexar County results reveal that only one Hispanic has been victorious in six contests. In the other targeted counties, no minority has ever won. In Jefferson, Lubbock, Ector and Midland counties, no minority has ever run. Findings of Fact No. 31. (Appendix, at pp. 279a-280a).

REASONS FOR GRANTING THE WRIT

I.

The Decision of the En Banc Fifth Circuit Conflicts with Applicable Decisions of This Court

Despite its contention to the contrary, the *en banc* decision of the Fifth Circuit conflicts with the decisions of this Court in *Haith v. Martin*, 618 F. Supp. 410 (E. D. N. C. 1985), *aff'd mem.*, 477 U. S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986), and most recently, *Georgia State Board of Elections v. Brooks*, Civ. No. 288-146 (S. D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990).

These two decisions hold that Section 5 of the Voting Rights Act applies to judicial elections. The proscribed practices covered by Section 2 and Section 5 are the same: any "voting qualification or prerequisite to voting, or standard, practice, or procedure" with respect to voting. This Court affirmed the holding in *Haith v. Martin*, 618 F. Supp. at 413, that " . . . the Act applies to all voting

without any limitation as to who, or what, is the object of the vote." (emphasis in original).

Although the majority opinion of the *en banc* Fifth Circuit does not dispute the *Haith* decision, and although they assert that some portions of Section 2 may apply to the judiciary, they held that the "results test introduced in response to the holding in *Bolden* to govern vote dilution in the election of 'representatives,' . . . by its own terms does not" apply to the judiciary. *LULAC, en banc*, 914 F. 2d at 629. (Appendix, at p. 29a). As pointed out by both Judge Higginbotham's concurrence, *LULAC, en banc*, 914 F. 2d at 638-642, (Appendix, at pp. 62a-79a), and Judge Johnson's dissent, *LULAC, en banc*, 914 F. 2d at 655-659, (Appendix, at pp. 129a-140a), the majority has constricted the coverage of Section 2 by placing an unwarranted restriction upon the word "representatives," in light of the purposes of the Voting Rights Act, and the definitions of "voting" contained therein.

Given the identical language in Sections 2 and 5, basic tenets of statutory construction require that the sections be given identical meaning. *Pampanga Sugar Mills v. Trinidad*, 279 U. S. 211, 217-218 (1929); *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433 (1932). The two sections work in tandem. The only distinction between them relates to whether a voting practice may be continued or may be implemented. Such a distinction does not relate to the application of the two sections to judicial elections. If the Fifth Circuit's decision is not reversed, then changes in judicial election procedures could be prohibited under Section 5, but those identical practices could not be eliminated under Section 2. Such an anomaly cannot be within the intent of Congress to "rid the

country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U. S. 301, 315 (1966).

Further, the recent ruling in *Brooks* may well lay to rest the contention that Section 2 of the Voting Rights Act does not apply to judicial elections. One of the questions presented in the jurisdictional statement in *Georgia State Board of Elections v. Brooks*, *supra*, was "Whether the Voting Rights Act Should be Construed to Apply to the Election of Judges?" By affirmance, the Supreme Court has "rejected the specific challenges presented in the statement of jurisdiction" and "prevents lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U. S. 173, 176 (1977).

In addition to being contrary to the interpretation of the Voting Rights Act by the Supreme Court, the action of the Fifth Circuit is contrary to the will of Congress, as expressed in the legislative history and reaffirmed by this Court, that the Act have the "broadest possible scope." *Allen v. State Board of Elections*, 393 U. S. 544, 566-567, 89 S. Ct. 817, 22 L.Ed.2d 1 (1969).

By ignoring the teachings of *Haith* and now *Brooks*, and the intent of Congress, the Fifth Circuit's *en banc* ruling has carved out an exception to the coverage of the Voting Rights Act which will deny thousands of minority voters an equal opportunity to vote for judges of their choice in an election system free of discriminatory elements. If the decision of the Fifth Circuit is allowed to stand, then the law will be that discrimination in voting will not be tolerated, *except in the election of judges*. This Court is called upon to correct this blatant denial of

minority voting rights and to effect the will of Congress that the nation's electoral systems be free of discrimination.

II.

There Is A Conflict Between the Fifth and Sixth Circuits

The decision of the Fifth Circuit in this case, which held that the system for electing judges is not amenable to a vote dilution challenge under the amended Section 2 of the Voting Rights Act, is directly contrary to the decision of the Sixth Circuit in *Mallory v. Eyrich*, 839 F. 2d 275 (6th Cir. 1988). At issue there was the county wide election of judges in a merged municipal (Cincinnati) and county (Hamilton County, Ohio) court system. The Sixth Circuit held that claims of vote dilution were covered by Section 2 of the Voting Rights Act, and remanded the case for further proceedings.

In reaching contrary conclusions, each court relied upon a set of principles, which, although the same, lead to contrary legal conclusions.

Analysis of the Conflict

1. Judges Are "Representatives" for Purposes of the Voting Rights Act.

Both decisions examine the use of the word "representatives" in the language of the amended Section 2, 42 U.S.C. 1973:

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes

leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice. (emphasis added).

The majority in the Fifth Circuit concluded that Congress specifically chose a word, "representative," that had consistently been interpreted not to include the judiciary. They relied principally upon reapportionment cases which held that one-person, one-vote rules do not apply to the judiciary. *LULAC*, 914 F. 2d at 626, n. 9. (Appendix, at pp. 16a-17a). The majority then reasoned that since judges are not representatives for numerical apportionment purposes, then the addition of the word "representative" to the amended Section 2 prevents any claim of vote dilution from being made, even though other parts of Section 2 may apply to judicial elections. (Appendix, at pp. 24a-27a).

The Sixth Circuit took a broader view and interpreted "representative" to be inclusive of the judiciary under the reasoning that the Voting Rights Act is intended to remedy all discrimination in voting, and that the 1982 amendments were intended to expand the Act, not restrict it. That Court relied upon the definition of "voting" in the Act itself, 42 U.S.C. 1973 1 (c)(1):

The terms "vote" and "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law

prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

As a result the court determined that judges were "candidates for public . . . office," and, therefore, the system under which they are elected is subject to a dilution claim under the Voting Rights Act.

Following this Court's rule of statutory interpretation that the legislative history is the authoritative source for ascertaining Congress' intent in amending the Voting Rights Act, *Thornburg v. Gingles*, 478 U. S. at 43, n. 7, the Sixth Circuit noted that the terms "representatives," "candidates," and "elected officials" are used interchangeably throughout the text.⁷

As a result, the Sixth Circuit determined that "there is no basis in the language or legislative history of the 1982 amendment to support a holding that use of the word 'representative' was intended to remove judicial elections from the operation of the Act," *Mallory v. Eyrich*,

⁷ a. *Senate Report No. 417*, at 16: "elected officials;"

b. *Ibid.*, at p. 28: "Section 2 protects the right of minorities to elect candidates of their choice;"

c. *Ibid.*, at p. 30: "opportunity to . . . elect candidates of their choice;"

d. *Ibid.*, at p. 31: ". . . elect candidates of their choice;"

e. *Ibid.*, at p. 67: ". . . elect candidates of their choice;"

f. *Ibid.*, at p. 193: Additional Views of Senator Dole: ". . . equal choice of electing candidates of their choice."

839 F. 2d 278-281. Thus the judicial election system in Ohio was subject to a Section 2 attack.

2. The Non-applicability of One-Person, One-Vote Principles to Judicial Election Systems Does Not Foreclose a Vote Dilution Claim

It has been held that one-person, one-vote principles do not apply to judicial districts. *Wells v. Edwards*, 347 F. Supp. 453 (M. D. La. 1972) *aff'd*, 409 U. S. 1095 (1973). The circuits differ as to whether this principle can be extended to the question of coverage by the Voting Rights Act.

The Sixth Circuit specifically rejected this extension stating that one-person, one-vote principles address an equal protection problem under the Fourteenth Amendment, whereas analysis of a Section 2 claim involves the construction of an act of Congress outlawing racial discrimination in voting. *Mallory v. Eyrich*, 839 F. 2d 277-278.

The majority of the Fifth Circuit held that vote dilution claims were based upon one-person, one-vote principles, and therefore if the former did not apply to the judiciary, then neither could the latter. *LULAC, en banc*, 914 F. 2d at 627-628. (Appendix, at pp. 20a-24a). However, the concurrence argued that vote dilution cases against the judiciary are not precluded by one-person, one-vote principles. They reasoned that racial and non-racial acts by the state that deny voting strength are not legally the same: one is facially neutral in the matter of race; the other rests on the concern of submerging the voting strength of minorities by the combined force of bigotry

and election methods. *LULAC, en banc*, Higginbotham, concurring, 914 F. 2d at 643. (Appendix, at pp. 80a-82a).

3. The Interpretation of the Voting Rights Act by the Attorney General Is Authoritative

As this Court has noted in *United States v. Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 131, 98 S. Ct. 965, 55 L. Ed. 2d 148 (1978), interpretation of the Voting Rights Act by the Attorney General constitutes a compelling argument "especially in light of the extensive role the Attorney General played in drafting the statute and in explaining its operation to Congress."

At the request of the Fifth Circuit, the present Attorney General filed an *amicus* brief before the *en banc* court, and sent his Assistant in charge of the Civil Rights Division to personally argue this case to emphasize his contention that "The United States has consistently interpreted the coverage language of Section 2 and the almost identical language in Section 5 to apply to the election of all judges (citations omitted)." Supplemental Brief for the United States as *Amicus Curiae*, filed June, 1990, in 90-8014, *LULAC, et al. v. Mattox, et al.*

Contrary to *Sheffield*, the *en banc* Fifth Circuit characterized the viewpoint of the Attorney General that Section 2 of the Voting Rights Act covers judicial elections as one of a "scatter of birdshot contentions," *LULAC, en banc*, 914 F. 2d at 630, (Appendix, at p. 30a), and dismissed the Attorney General's interpretation without analysis.

The Sixth Circuit, however, accorded due recognition to the view of the Attorney General that Section 2 of the Voting Rights Act applies to judicial elections. *Mallory v. Eyrich*, 839 F. 2d at 281.⁸

The Conflict Involves an Important Question of Fundamental Rights

Cases involving judicial elections have been heard or are pending in several jurisdictions. Until the Fifth Circuit's decision in *LULAC*, no circuit court and no trial court, without being reversed, had held that Section 2 of the Voting Rights Act does not apply to vote dilution claims involving judges.⁹ Unless resolved by this Court, it is obvious that there will be an important and recurring conflict involving the basic right to vote. Given the

⁸ Although not concerned with judicial elections, the Eleventh Circuit has also affirmed that "[n]owhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 [of the Voting Rights Act] on the function performed by an elected official." *Dillard v. Crenshaw County*, 831 F. 2d 246, 250 (11th Cir. 1987).

⁹ *Mallory v. Eyrich*, 839 F. 2d 275 (6th Cir. 1988)
Chisom v. Roemer 853 F. 2d 1186 (5th Cir. 1988)
Clark v. Edwards, 725 F. Supp. 285 (M. D. La. 1988)
Rangel v. Mattox, (5th Cir. No. 89-6226)
Nipper v. Martinez, No. 90-447-Civ-J-16 (M. D. Fla. 1990)
SCLC v. Siegelman, 714 F. Supp 511 (M. D. Ala. 1989)
Brooks v. State Bd. of Elec., 111 S. Ct. 288 (1990)
Hunt v. Arkansas, No. PB-C-89-406 (E. D. Ark. 1989)
Williams v. St. Bd. of Elec., 696 F. Supp. 1563 (N. D. Ill. 1988)
Martin v. Allain, 658 F. Supp. 1183 (S. D. Miss. 1987)
Alexander v. Martin, No. 86-1048-CIV-5 (E. D. N. C.)
LULAC v. Texas, No. B-89-193 (S. D. Tex. 1989)

number of cases pending and the fundamental nature of the issue, it would be intolerable to allow this conflict to continue unresolved.

The conflict between the Fifth and Sixth Circuit's interpretation of the coverage of the Voting Rights Act as it applies to judicial elections should be resolved by this Court.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

Supreme Court U.S.
FILED
DEC 21 1990
JOSEPH F. SPANIOLO, JR.
CLERK

HOUSTON LAWYERS' ASSOCIATION, et al.,
Petitioners,
vs.

JIM MATTOX, et al.,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, et al.,
Petitioners,

vs.

JIM MATTOX, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

**MEMORANDUM IN RESPONSE TO PETITIONS FOR
CERTIORARI**

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December 21, 1990

QUESTIONS PRESENTED

1. Whether the results standard of Section 2 of the Voting Rights Act, as amended, applies to elective judicial systems?
2. Whether a vote dilution challenge under the results standard of Section 2 of the Voting Rights Act, as amended, can be established against a system for electing judicial officials who function as solo decisionmakers?

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MEMORANDUM IN RESPONSE TO PETITIONS FOR CERTIORARI

This memorandum, filed on behalf of the state officials who were official-capacity defendants in the district court,¹ responds to two petitions for writs of certiorari arising from the same decision and presenting virtually identical questions for review. The two petitions are *Houston Lawyers' Association v. Mattox*, No. 90-813, and *League of United Latin American Citizens, Inc. v. Mattox*, No. 90-974. The petitioners in these two cases will be referred to as "HLA" in the case of No. 90-813 and "LULAC" in the case of No. 90-974.

¹ These respondents are: the Attorney General of Texas (Jim Mattox); the Secretary of State of Texas (George S. Bayoud, Jr.), and the thirteen members of the Judicial Districts Board of Texas. The Judicial Districts Board is comprised of the Chief Justice of the Supreme Court of Texas (Thomas R. Phillips), the Presiding Judge of the Court of Criminal Appeals of Texas (Michael J. McCormick), the President of the Texas Judicial Council (Judge Joe Spurlock, II), an attorney (Leonard E. Davis) appointed by the Governor of Texas, and the Presiding Judges of the nine Administrative Judicial Regions in Texas (Judges Pat McDowell, Thomas J. Stovall, Jr., B. B. Schraub, John Cornyn, Darrell Hester, Sam B. Paxson, Weldon Kirk, Jeff Walker, and Ray D. Anderson). This memorandum will refer to them collectively as "state officials." Two Texas state district judges -- one from Harris County and one from Dallas County -- intervened in the district court proceeding as defendants in their personal capacities only. This memorandum is not filed on their behalf. Likewise, this memorandum is not filed on behalf of six Texas state district judges based in Bexar County, Texas, who appealed the district court's denial of their attempted intervention but failed to obtain an intervention ruling from the Fifth Circuit. An attorney (Mr. Wheatley) purporting to represent them has entered an appearance in this Court. Insofar as he is appearing to represent them in their official capacities as state officials, the Attorney General of Texas challenges the attorney's legal authority to appear.

OPINIONS BELOW

HLA's Appendix omitted four district court orders modifying its Memorandum Opinion and Order of November 8, 1989, HLA App. 183a-304a. It also omitted the district court's two orders on remedy. The omitted orders constitute the appendix following this memorandum.

JURISDICTION

HLA and LULAC invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) to review the Fifth Circuit's decision of September 28, 1990.

STATUTES INVOLVED

HLA's petition, at 3, omits from the end of its quotation of subsection (a) of the current version of Section 2 of the Voting Rights Act the phrase "in contravention of the guarantees set forth in § 1973b of this title, as provided in subsection (b) of this section." LULAC's petition, at 2-3, contains the complete text of Section 2.

STATEMENT OF THE CASE

The Fifth Circuit opinion accurately summarizes the procedural history of this case; however, heeding the Court's Rule 15.1 admonition to respondents to address any perceived misstatements of fact or law in certiorari petitions which potentially bear on the issues before the Court, the state officials supplement the Fifth Circuit's summary in response to some of the statements in the petitions of HLA and LULAC.

The Proceedings Below

At the time of trial in September, 1989, the district court had before it constitutional and statutory challenges to the Texas system of electing judges in ten Texas counties, not eleven as stated by HLA and not nine as stated by LULAC. The ten targeted counties contained 172 of the then-extant 384 (not 375) judicial districts in Texas. Now, the ten targeted counties contain 174 of the 386 judicial districts in Texas.²

In its November 8th liability decision, as modified in four subsequent orders, the district court rejected the plaintiffs' constitutional claims. It found that the "present system" is not maintained as a tenuous pretext for discrimination. HLA App. 283a. It later determined that the plaintiffs failed to prove "that the present at large system for electing State District Judges in the State of Texas was instituted with the specific intent to dilute, minimize or cancel the voting strength of Black and/or Hispanic voters." HLA App. 302a. No one appealed this determination.

² Awaiting decision by a three-judge federal district court in Texas is a challenge under Section 5 of the Voting Rights Act, as amended, to 13 of the 386 judicial districts in Texas, plus four judicial districts which will operate only if certain as-of-yet unmet preconditions are satisfied (and which would bring the total number of Texas judicial districts to 390). Six of the 13 (and 10 of the total of 17) newly challenged districts are in the ten counties targeted in this lawsuit. The case, tried on December 12, 1990, is *Mexican American Bar Association of Texas, et al. v. Texas, et al.*, Civ. Action No. MO-90-CA-171 (W.D. Tex.) ("*MABA*"). The challenge, lodged at overlapping, but not wholly contiguous, targets by private plaintiffs and the United States, principally is based on the November 5, 1990, letter from the Department of Justice's Assistant Attorney General for Civil Rights, HLA App. 305a-308a, as substantially modified by his letter of November 20, 1990, which is not in HLA's Appendix.

Tellingly, HLA and LULAC offer differing characterizations of the constitutional challenge rejected by the district court. HLA characterizes its challenge as one against "the at-large, winner-take-all, majority vote, numbered post requirement" for electing district judges. HLA Pet., at 5. LULAC characterizes the challenge more narrowly as one directed at a state constitutional provision establishing the manner by which smaller-than-countywide judicial districts may be created. LULAC Pet., at 6. The breadth of the district court's decision on the constitutional issue indicates that HLA's characterization is nearer the mark.

Invoking the three-part test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), and canvassing other factors enumerated in the Senate Report on the 1982 amendments to the amended Section 2, the district court found unintentional vote dilution in all the targeted judicial districts in all the targeted counties and, consequently, a violation of the effects standard established in Section 2 of the Voting Rights Act.

In the course of reaching this result, the district court rejected the state officials' argument that any analysis of the plaintiffs' claim of unintentional vote dilution must take into account evidence about the impact of partisan voting patterns on electoral outcomes. Despite its characterization of *Whitcomb v. Chavis*, 403 U.S. 124 (1971), as having rejected a racial vote dilution challenge on the ground that partisan voting best accounted for electoral outcomes, the district court concluded that "[p]arty affiliation is **simply irrelevant**[" HLA App. 287a (emphasis added).

The district court thus refused to assess in any fashion the evidence offered to demonstrate that partisan voting patterns best accounted for electoral outcomes in each of the targeted counties. The facts relevant to HLA's statement, HLA Pet., at 11, that race consistently outweighed partisan affiliation in district judge elections in Harris County have never been evaluated by a court and remain hotly contested.

Subsequently, the district court ordered implementation of a non-partisan, single-member district election system for 1990 judicial elections in the targeted counties. It is to this specific remedy, and to no other, that HLA refers when it rather vaguely states that the district court found that "an alternative electoral scheme" would provide equal opportunity to minority voters, HLA Pet., at 12.

Through separate timely notices, the state officials first appealed the liability decision of November 8, 1989, and, later, the subsequent remedial orders of January 2, 1990, and January 11, 1990. On January 10, 1990, in an event omitted from HLA's petition, the state officials filed an emergency motion to stay the district court's remedy. (Other parties had filed stay motions earlier.) The Fifth Circuit filed its stay order on January 11, 1990.

The Fifth Circuit panel, in a two-to-one vote, held that unintentional vote dilution claims could not be established against Texas trial judges whom

the district court had found to be "sole, independent decision makers," HLA App. 289a.³

The Fifth Circuit in an *in banc* decision on September 28, 1990, held that the effects standard of Section 2 is inapplicable in challenges to systems for electing judges. Five members of the Fifth Circuit joined the second part of a concurring opinion by Judge Higginbotham adopting the rationale that vote dilution claims under Section 2's effects standard cannot be established against solo decisionmaker judgeships. Chief Judge Clark filed a special concurrence for himself only, and Judge Johnson was the sole dissenter from the court's judgment.

LULAC misleadingly characterizes the district court's findings on vote dilution as "undisturbed on appeal." LULAC Pet., at 8 n.3. The more accurate characterization is that they were "unaddressed" on appeal. A myriad of legal and factual disputes lying beyond the basic statutory coverage question remain unaddressed thus far at the appellate level. Many of them, including one of overwhelming significance (the relevance of partisan voting patterns to vote dilution analysis), have importance in voting rights law beyond the sphere of judicial elections and will have to be addressed by the Fifth Circuit on remand and perhaps subsequently by this Court even if HLA and LULAC prevail on the questions they have presented to the Court.

³ Contrary to the implication in HLA's petition, at p. 8, this case and the *Chisom* case out of Louisiana were *not* argued together before the Fifth Circuit panel on April 30, 1990. They were argued separately and focused on different issues.

Statement of Facts

The state officials here seek only to correct certain omissions or misstatements in the certiorari petitions which appear potentially relevant to the basic coverage issues presented to the Court. As already explained, the Fifth Circuit did not have occasion to address the many facts in this case concerning, for example, electoral outcomes in the targeted counties over the last decade. Those facts are largely irrelevant in the case's posture before this Court, and the state officials will not undertake to refute every shade of error in HLA and LULAC's recitation of the underlying facts.

Texas elects its district judges through partisan elections. Contrary to HLA's statement that both primary and general elections for state district judge have a majority vote requirement, HLA Pet., at 9-10, only the party primary elections have such a requirement. A plurality suffices for victory at the general election.

HLA is technically incorrect in its statement that every targeted county elects more than one district judge, HLA Pet., at 10. Crosby County is implicated by only one of the challenged judicial districts, the 72nd, which encompasses Lubbock and Crosby counties.

HLA also is incorrect in the statement opening its recitation of the facts of the case that Texas judicial districts may be no smaller than an entire county, HLA Pet., at 9. Section 7a(i) of Article 5 of the Texas Constitution permits the voters of a county the opportunity to authorize the

creation of judicial districts smaller than the entire county.

ARGUMENT (STATEMENT)

No Opposition to Court Review

The state officials do not oppose this Court's granting of HLA and LULAC's petitions for writs of certiorari. The questions raised are of undoubted significance to the nation's jurisprudence, many of its state judicial systems, and minority voters.

Furthermore, the state officials are constrained to concede that the *in banc* Fifth Circuit decision of September 28, 1990, conflicts with the earlier Sixth Circuit decision in *Mallory v. Eyrich*, 839 F.2d 620 (6th Cir. 1988), although the two decisions do not run on such parallel tracks that they conflict in every particular element of their analysis. It is enough that there is a basic conflict in their results.

The preceding concession by the state officials should in no way be viewed as a concession that the Fifth Circuit reached an incorrect result. It did not; however, as the state officials understand it, the correctness of the result below is not a matter with which the Court is particularly concerned at this stage of its review process.

Likewise, the concession of the appropriateness of this case for plenary (not summary) review by the Court is not a concession of LULAC's argument that the Fifth Circuit decision conflicts with the Court's summary affirmances in two cases involving the interaction of Section 5 of the Voting Rights Act and judicial elections, *Georgia State Board of Elections v. Brooks*, Civ. No.

288-146 (S.D. Ga. 1989), *aff'd mem.*, 111 S.Ct. 288 (1990), and *Haith v. Martin*, 618 F.Supp. 410 (E.D. N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986). Despite the oft-repeated claim that the two provisions, Section 2 and Section 5, operate in tandem, they remain different provisions, with different language, different applications, and different repercussions. Holding, as the Fifth Circuit did, that the effects standard of Section 2 does not cover racial vote dilution challenges to judicial elections does not present a conflict with summary affirmances in Section 5 voting rights cases affecting judges which would warrant this Court's review.

Having distinguished Section 2 cases from Section 5 cases, the state officials do note a possible additional reason why the Court should grant certiorari in this case. The United States, through its Department of Justice, has indicated that it is not bound, **even in Texas**, by the Fifth Circuit's *LULAC* decision on Section 2's reach. See HLA App. 307a.⁴ Instead, argues the United States, Section 5 empowers it to independently assess Section 2's reach in Texas, regardless of governing Section 2 law in the Fifth Circuit.

Texas is a covered jurisdiction under Section 5. Surely, the United States, through the Justice Department, will acknowledge that it is at least bound by a decision of this Court on the reach of Section 2. Thus, a clear statement from this Court

⁴ During the trial on December 12, 1990, in the *MABA* case, *supra* at 3 n.2, the attorney for the United States continued to defend this position, which appears to contravene the Court's assessment that the United States Attorney General "does not act as a court" in exercising his Section 5 powers of review of state legislation, *Allen v. State Board of Elections*, 393 U.S. 544, 549 (1969).

on Section 2's reach will enable Texas and the United States to agree to be bound by the same judicial rulings. Texas should not be compelled to defend its position on Section 2's reach twice, once before the Fifth Circuit and, afterwards, before the United States Attorney General.

Additional Issues Within The Court's Purview

HLA urges the Court to hear this case "at the same time" as the case of *Chisom v. Roemer*, No. 90-757, HLA Pet., at 22. Whatever may be meant by this request, the state officials suggest that the Court not consolidate this case with *Chisom*. No claims of intentional discrimination remain in this case, whereas, at least as the undersigned counsel understands it, such claims do remain part of the *Chisom* case.

HLA also urges the Court to review the subsidiary question of whether the principle announced in the Fifth Circuit's panel decision concerning unintentional vote dilution claims and solo decisionmakers is correct. HLA's argument for this approach is that leaving it for the Fifth Circuit to decide on remand (if, indeed remand ultimately is necessary) would be a "time-consuming and pointless course." HLA Pet., at 25.

While the state officials have no quarrel with HLA's suggestion, they would add that HLA's rationale also suggests the advisability of this Court also taking up another question, if it ultimately agrees with the petitioners on their arguments. That question is whether *Whitcomb v. Chavis*, *supra*, remains good law under Section 2 of the Voting Rights Act. As explained earlier, the district court, through its treatment of partisan voting patterns as a legal and factual irrelevancy,

treated *Whitcomb* as a dead letter in Section 2 vote dilution analysis.

There is no reason for this Court, should it disagree with the state officials on the scope of Section 2's coverage, not to reach this additional critical question in voting rights law. It potentially is a critical question in this case, and it assuredly will be a critical question in the litigation ensuing from the upcoming round of decennial reapportionment.

CONCLUSION

This case is a critical one for states which elect their judicial officers. The state officials, while vigorously defending the correctness of the result reached by the Fifth Circuit, recognize that the questions presented here need to be definitively settled. The requisite definitiveness can occur nowhere but here -- especially in light of the United States' puzzling intransigence on the question. Based upon the foregoing matters, the state officials do not oppose the Court's granting of HLA and LULAC's petitions for writs of certiorari and the setting down of these cases for plenary review.

Respectfully submitted,

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Dec. 21, 1990

FILED
NOV 14 1989
U.S. DISTRICT COURT
CLERK'S OFFICE
BY /s/ DEPUTY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LULAC COUNCIL #4434,	§	
ET AL.,	§	Civil Action No.
	§	
vs.	§	MO-88-CA-154
	§	
JIM MATTOX, ET AL.,	§	

ORDER

Came on for consideration, Dallas County plaintiff/intervenors' Motion to Correct Clerical Mistake, and after having reviewed the pleadings, it is the opinion of this Court that said Motion is well taken and it is therefore,

ORDERED, ADJUDGED and DECREED that:

1. Dallas County plaintiff/intervenors shall be noted in the style together with other plaintiff and defendant intervenors; and
2. at the conclusion of the paragraph numbered "3." that the following description of Dallas County plaintiff/intervenors shall be inserted: "plaintiff/intervenors from Dallas County, Jesse Oliver, Joan Winn White and Fred Tinsley, are black attorneys and citizens of Dallas County, Texas, each of whom is a former district judge from Dallas County,

who was defeated in a county-wide election
for district judges."

SIGNED this the 14th day of November,
1989.

/s/ LUCIUS D. BUNTON
UNITED STATES
DISTRICT JUDGE

FILED
 NOV 27 1989
 U.S. DISTRICT COURT
 CLERK'S OFFICE
 BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF TEXAS
 MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED §
 LATIN AMERICAN §
 CITIZENS (LULAC), §
 COUNCIL #4434 §
 et al. §
 Plaintiffs, §
 AND §
 HOUSTON LAWYERS §
 ASSOCIATION §
 et al. §
 Plaintiff-Intervenors §
 V. §
 §
 JIM MATTOX, et al., §
 State Defendants §
 AND JUDGE §
 SHAROLYN WOOD §
 AND JUDGE F. HAROLD §
 ENTZ §

MO-88-CA-154

ORDER

BEFORE THIS COURT is the State Defendants' Motion to alter or Amend this Court's Memorandum Opinion and Order of November 8, 1989 in the above-captioned cause. After this Court's Order was signed and entered, it was

brought to the attention of the Court that there were some clerical errors and omissions in this Court's Order. This Court is of the opinion that the State Defendants' Motion should be granted in part and denied in part. Accordingly,

IT IS ORDERED that this Court's previous Memorandum Opinion and Order be amended in part.

IT IS FURTHER ORDERED that the items telephonically communicated to this Court by Plaintiffs' Counsel be amended as follows:

1. The top of page 13 just before Finding of Fact number four be amended to reflect the following:

Plaintiff-Intervenors from Dallas County include Joan Winn White, Fred Tinsley and Jesse Oliver.

2. The last line of the second paragraph of Finding of Fact number eight on page 17 is amended to read, " ... greater than fifty percent (50%) Hispanic voting age population were possible."

3. The second sentence of the first full paragraph on page 21 is amended to read, "Minority residents are concentrated largely in the Northeastern, East Central and Southeastern sections of Midland County."

4. Conclusion of Law number 16, as continued at the top of page 90, line one, is amended to include "Hispanic" after "Black" and the appropriate comma.

IT IS FURTHER ORDERED that items 1-3, 6 & 11 of the State Defendants' Motion are hereby GRANTED.

IT IS FURTHER ORDERED in connection with item 5 of the State Defendants' Motion that Finding of Fact 20.a. on page 49 is amended as follows:

Dr. Brischetto analyzed three (3) 1988 countywide judicial elections in Travis County. All three elections analyzed were County Court at Law Primary Elections.

IT IS FURTHER ORDERED that in connection with item 9 State Defendants' request is GRANTED IN PART to reflect that it was the 1986 Democratic Primary that was being discussed, rather than the Runoff Election. Item 9 is DENIED in all other respects.

IT IS FURTHER ORDERED that items 4, 7, 8 & 10 of the State Defendants' Motion are hereby DENIED.

IT IS FURTHER ORDERED that this Court's Memorandum opinion and Order remains unchanged in all other respects.

SIGNED AND ENTERED this the 27th day of November, 1989.

/s/

LUCIUS D. BUNTON
CHIEF JUDGE

FILED
 DEC 26 1989
 U.S. DISTRICT COURT
 CLERK'S OFFICE
 BY /s/_____DEPUTY

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF TEXAS
 MIDLAND/ODESSA DIVISION

LULAC COUNCIL #4434,	§	
et al.,	§	
Plaintiffs,	§	
	§	Civil Action No.
vs.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
Defendants.	§	

ORDER

On this day came before the Court the State Defendants' Rule 60 (a) Motion to Correct Clerical Mistake. The motion is GRANTED. The last sentence of the last full paragraph on the second page of the Court's Order of November 27, 1989, is corrected to read as follows: "All three elections analyzed were 1988 Democratic Primary elections, two of which were for county court at law positions and one of which was for a district court position."

SIGNED and ENTERED this 26th day of December, 1989.

/s/ LUCIUS D. BUNTON
 UNITED STATES
 DISTRICT JUDGE

FILED
 DEC 28 1989
 CHARLES W. VAGNER, Clerk
 BY /s/ DEPUTY

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF TEXAS
 MIDLAND-ODESSA DIVISION

LULAC, et al.,	§	
Plaintiffs,	§	
	§	
vs.	§	NO. MO-88-CA-154
	§	
MATTOX, et al.,	§	
Defendants.	§	

ORDER TO CORRECT CLERICAL ERRORS

1. In accordance with F.R.Civ.P. 60, the Court makes the following corrections of clerical mistakes in its Memorandum Opinion and Order of November 8, 1989:

2. On page 12, the following sentence is added to Paragraph 2: "Jesse Oliver, a Black from Dallas, testified that he is a member of LULAC."

3. On page 18, the following sentence is added to the end of the second complete paragraph of Paragraph 9: "This remains true when Plaintiffs controlled for voting age population of non-United States citizen of Spanish origin."

Done this 28th day of December, 1989, at Midland, Texas.

/s/ LUCIUS D. BUNTON
 UNITED STATES
 DISTRICT JUDGE

FILED
 JAN 2 1990
 U.S. DISTRICT COURT
 CLERK'S OFFICE
 BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF TEXAS
 MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
COUNCIL #4434	§	
et al.,	§	
Plaintiffs	§	
AND	§	
HOUSTON LAWYERS	§	
ASSOCIATION	§	
et al.	§	
Plaintiff-Intervenors	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX, et al.,	§	
State Defendants	§	
AND JUDGE	§	
SHAROLYN WOOD	§	
AND JUDGE F. HAROLD	§	
ENTZ	§	

ORDER

BEFORE THIS COURT are the parties with their respective Proposed Interim Plans, Motions to Certify this Court's Memorandum Opinion and Order, of November 8, 1989, for Interlocutory

Appeal, and Motion of Bexar County District Judges to Intervene in the above captioned cause.

This case is reminiscent of several lines of a recent song, I'm for Love, by Hank Williams, Jr. The lyric goes,

"The city is against the county,
The county is against the state,
The state is against the government,
and
The highway still ain't paved."

In this case the Governor has been against the Attorney General, the Attorney General against the Legislature, the Judges against this Court, and the system is still flawed. This is a regrettable situation, but it can't be helped. The Hank Williams song goes on to say "But I'm for love, and I'm for happiness."

This case was filed on July 11, 1988 and originally set for trial on February 13, 1989. The Court was persuaded, at least on one occasion, to continue the trial to give the Texas Legislature a chance to address the issue during its Regular Session. This Court continued the above captioned cause to April 17, 1989 to await the United States Supreme Court's disposition of the Petition for Writ of Certiorari in the case of Roemer v. Chisom. The Court again continued the case to July 11, 1989, based on oral Motions to Continue made on the record during a hearing on Motions to Intervene held by this Court on February 27, 1989. The Court continued the trial to September 18, 1989, because of a conflict of settings with one of the attorneys. At the conclusion of the trial in September, the Court was requested to hand down its opinion prior to the convening of the Texas Legislature in Special Session so that a violation (if one was indeed found) could be looked at and perhaps remedied during the Special Session.

This Court specifically reserved ruling upon Plaintiffs' Motion for an Order enjoining further use of the at-large election scheme in the affected counties until the State Legislature had an opportunity to offer a remedial plan. The Legislature went into Special Session on November 13, 1989, some five days after entry of this Court's November 8, 1989 Order. Governor Clements deemed it advisable not to submit the question of judicial redistricting to the Special Session. The Governor did, however, request that he and this Court meet and discuss the matter. The meeting was held, and attorneys for both Plaintiffs and Defendants were present. The Governor advised the Court that no remedy would be forthcoming until some time after the March 13, 1990 Primary Elections. The Governor requested that the matter be delayed until the Regular Session of the Legislature in January 1991. He further advised the Court that, if this was not satisfactory, he would call a Special Session some time in April or May of 1990 and request the Legislature to study and take whatever action might be necessary to remedy the situation.

The timing is perhaps unfortunate. There will be a census taken in 1990, which may reflect some changes in population in the nine counties involved. Our Legislature meets in Regular Session only in odd years and inevitably somewhere down the line the method of selection or election of State District Judges will have to be submitted to the voters of Texas. The Court is of the opinion that a delay until after the Primary Elections are held in 1990 and a delay until after a Special Session of the Legislature is held in late spring of 1990 and a further delay of implementation of any solution by the Legislature would not be in the interest of justice, would further dilute the rights of minority

voters in the target counties in question, and would be inequitable and work an even greater hardship on the judges and courts involved.

Because the Legislature took no action on the matter in Special Session in November and December, 1989, and the refusal of the Supreme Court to grant a writ in Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir. 1988), and the statements of the Governor of the State of Texas, and the imminence of the Primary Elections in 1990, the Court is not inclined to defer action. See Wise v. Lipscomb, 437 U.S. 535 (1978). Under these circumstances, this Court is of the opinion that it may fashion an interim plan that the law, equity and justice require. Chisom, supra, at 1192. On December 12, 1989, or shortly thereafter, all parties were advised to file any Proposed Plans and objections with the Court by December 22, 1989. An Agreed Settlement was entered into by and between the Plaintiffs and Defendants in this matter, but was not approved by some of the Intervenor.

The Court should point out that the State Legislature will have still a third opportunity to propose a permanent remedy consistent with this Court's November 8, 1989 Order should it convene, and should it pass legislation in April or May of 1990.

The plan which follows is strictly an interim plan for the 1990 elections affecting 115 State District Court judicial seats in the nine counties in action. Upon consideration of the Motions, Responses, Objections, letters, exhibits, attachments and arguments of the parties, the Court is of the opinion that the following Orders are appropriate. Accordingly,

IT IS ORDERED that the Joint Motion of Plaintiffs, Plaintiff-Intervenor and the Attorney

General of Texas for Entry of a Proposed Interim Plan is hereby GRANTED IN PART and DENIED IN PART in the following respects:

1. All Defendants and those acting in concert are hereby enjoined from calling, holding, supervising and certifying elections for State District Court Judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties under the current at-large scheme.

2. For the 1990 elections, according to the Secretary of State of Texas, one hundred fifteen (115) District Court elections are scheduled in the counties affected by this Court's Order. The following number of District Courts are up for election by respective county: Harris (36); Dallas (32); Tarrant (14); Bexar (13); Travis (6); Jefferson (6); Lubbock (3); Ector (3); and Midland (2).

Under this Interim Plan, District Court Elections in Harris, Dallas, Tarrant and Bexar Counties shall be selected from existing State Legislative House District lines as indicated in Attachment A. District Court Elections in Travis County shall be from existing Justice of the Peace Precinct Lines. See Attachment A. District Court Elections in Jefferson, Lubbock, Ector and Midland Counties shall be according to existing County Commissioner Precinct Lines. Id. Each county shall be designated by a District Number, and each election unit by subdistrict number.

3. Each candidate shall run within a designated subdistrict and be elected by the voters in the subdistrict. Consistent with the Texas Constitution, each candidate must be a resident of his or her designated judicial district (which is countywide), but need not be a resident of the election subdistrict.

4. Elections shall be non-partisan. Each candidate shall select the election subdistrict in which he or she will run by designated place. Candidates in Dallas, Tarrant, Bexar, Ector and Midland Counties shall file an application for a place on the election ballot with the County Elections Administrator. Tex. Elec. Code Ann §31.031 et seq. (Vernon 1986). Candidates in Harris, Travis, Jefferson and Lubbock counties shall file such an application with the County Clerk of those counties or the County Tax Assessor-Collector, depending on the practice of that particular county. Tex. Elec. Code Ann. §§ 31.1031 et seq., 31.091 (Vernon 1986).

5. All terms of office under this Interim Plan shall be for four (4) years. Tex. Const. Art. V, §7 (1976, amended 1985). This Court is of the opinion that a two-year term is unfair to both those beginning and those ending their judicial careers.

6. Elections shall take place the first Saturday of May, 1990, with Run-off Elections to take place the first Saturday of June, 1990. Tex. Elec. Code Ann. §41.001(b)(5) (Vernon Supp. 1989).

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on March 26, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

8. In 1991, the Administrative Judge of the countywide district shall designate:

(1) Any courts of specialization in terms of docket preference; and

(2) The District Court numbers in use prior to the Interim Plan's adoption. Successful incumbents shall have preference in such designation.

9. Current jurisdiction and venue of the District Courts remain unaffected, subject to modification by rule of the Supreme Court of Texas.

10. There shall be no right of recusal of judges elected under this plan. This Court is of the view that such a measure would be extremely disruptive to District Court dockets, administratively costly and could be the source of abuse by attorneys attempting to gain continuances of their cases.

IT IS FURTHER ORDERED that the above Interim Plan applies only to the 1990 State District Court Judicial Elections in the nine target counties at issue in this case. If the Texas Legislature fails to fashion a permanent remedy by way of a Special Called Session in the spring of 1990, then this Court will put into effect a Permanent Plan for the election of State District Court Judges in the nine target counties in question.

IT IS FURTHER ORDERED that the Motions of Defendant-Intervenor JUDGE SHAROLYN WOOD, Defendant-Intervenor JUDGE HAROLD ENTZ and the State Defendants to Certify this Court's Memorandum Opinion and Order of November 8, 1989 as modified for clerical corrections on November 27, 1989 and December 26, 1989 for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) is hereby GRANTED IN PART.

IT IS FURTHER ORDERED that to the extent that such Motions request a stay of further proceedings in the above captioned cause such Motions are hereby DENIED.

IT IS FURTHER ORDERED that the Motion of Bexar County Judges TOM RICKOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE AND MICHAEL P. PEDEN to Intervene as Defendants in the above captioned cause is hereby DENIED.

This Court, of course, has granted the right for an Interlocutory Appeal. The request to stay proceedings pending the appeal is DENIED, because the Court does not feel that District Judges should be continued in office for an indefinite period of time. The right of the electorate to select judges in the year 1990 should not be denied unless, of course, interim action is taken by the Texas Legislature which changes the method of the selection and election of judges. The pressing need for the administration of justice in our state courts is recognized. It is the opinion of this Court that the plan set forth herein is the least disruptive that can be effected at this juncture. To allow Primary Elections in 1990 to be held in the same manner as they were in 1988 would be contra to the dictates of Fifth Circuit law and the Congressional Mandate of the Voting Rights Acts. Recognition of the November 8, 1989 Judgment has far-reaching effects is the reason for the allowance of an expedited appeal, and again the Court would encourage the Governor to call a Special Session to address the matter and, further, would request that the State Legislature remedy the current situation, as the Court is firmly of the opinion that any remedy other than this interim remedy should be done by duly elected legislators.

SIGNED and ENTERED this 2nd day of January, 1990.

/s/

LUCIUS D. BUNTON
Chief Judge

FILED
 JAN 11 1990
 U.S. DISTRICT COURT
 CLERK'S OFFICE
 BY /s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF TEXAS
 MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED	§	
LATIN AMERICAN	§	
CITIZENS (LULAC),	§	
et al.	§	
	§	
V.	§	MO-88-CA-154
	§	
JIM MATTOX,	§	
Attorney General	§	
of the State of Texas,	§	
et al.	§	

ORDER

BEFORE THIS COURT is the Motion of Attorney General Jim Mattox on behalf of the State of Texas to Alter this Court's Order of January 2, 1990; the Response thereto of Harris County District Judge Sharolyn Wood; and the Response thereto of Plaintiffs LULAC et al., Plaintiff-Intervenors Jesse Oliver, et al., and Plaintiff-Intervenors Houston Lawyers Association et al. Having considered said Motion and Responses, the Court is of the opinion that said Motion should be denied.

The Court is further of the opinion that other changes to certain terms of the injunction

contained in that January 2, 1990 Order are proper. Specifically, the Court herein modifies the Order for the limited purpose of delaying the elections ordered pursuant to its Order, and removing the expedited rights of appeal previously granted in this matter.

The Court believes that delaying judicial elections pursuant to its Order of January 2, 1990 is desirable for several reasons. First, the Court notes that Governor Bill Clements recently called a special session of February 27, 1990, to deal specifically with Texas' system of selecting judges. In the interests of comity and Federalism, legislatively directed remedial measures are preferable to measures ordered by this Court. Delaying the judicial elections ordered by this Court will serve these interest by giving the Legislature additional time. Second, judicial elections will still take place in 1990 under the modified Order, thus minimizing disruption of the Texas judiciary. Third, delaying court-ordered judicial elections will provide additional time for the United States Department of Justice to consider any remedy adopted by the Legislature before such elections occur. Fourth, delaying these elections will remove the need for expedited appeal to the Fifth Circuit by providing additional time for that Court to consider and rule upon this Court's Order before court-ordered judicial elections occur.

The Court urges the Legislature to consider in its deliberations a quotation from President Harry S. Truman, who said, "[w]e must build a better world, a far better world--one in which the eternal dignity of man is respected."

I. The Attorney General's Motion is Properly Asserted Pursuant to Rule 59(e), Fed. R. Civ. P., and This Court Retains Jurisdiction to Modify Its Order of January 2, 1990.

The Defendant-Intervenor Judge Wood of Harris County appears to question the effect of the Attorney General's Motion on the notices of appeal filed in this case by herself and Judge Entz, and the powers of this Court to modify the terms of the injunction contained in its Order of January 2, 1990. There is no serious dispute before the Court that the parties to this case have the right under 28 U.S.C. Section 1292(a) (1) to appeal this Court's Order of January 2, 1990. If that Order were a judgment as to which the Attorney General's Motion is properly asserted under Rule 59(e), then the Parties' notices of appeal are ineffective, the Court retains jurisdiction to modify the judgment, and the deadlines for appeal are extended according to Fed. R. App. P. 4(b) (4). The Court believes that Order is such a judgment, and that this is the correct analysis.

A "judgment" for purposes of Rule 59(e), which provides for the amendment of a judgment and the postponement of the time for filing an appeal, is defined in Rule 54(a). See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Section 2651 and cases cited therein. Rule 54(a) defines judgment as an "appealable order." 28 U.S.C. Section 1292(b) undisputedly makes this Court's Order of January 2, 1990 appealable of right. Therefore a motion to alter or amend the judgment is properly asserted under Rule 59(e).

The Attorney General's Motion would properly be brought under Rule 62(c), if jurisdiction of the case were already lodged in the court of appeals, for example where a Rule 59(e)

motion was not timely made and appeal was taken, or a Rule 59(e) motion was made and ruled upon, and appeal subsequently taken.

The Court assumes for the purposes of this Motion that there exist other circumstances that would make a Rule 59(e) Motion improper here, although the Court takes pains to note that the parties have not cited the Court to such circumstances, and the Court in examining its jurisdiction has so far found none. In that event, Judge Wood contends, the Attorney General's Motion is one properly asserted under Rule 62(c), under which Rule this Court's modification powers are curtailed.

The Court also assumes that its sua sponte alteration of a judgment, that is independent of and goes beyond the alteration requested by a party under Rule 59(e), might be reviewed under the standard of Rule 62(c). The problem is that the timely filing of a Rule 59(e) motion, which the Court believes has been done here, suspends the appeal process and renders Rule 62(c) technically inapplicable because the case is not on appeal. Absent appeal, a district court has complete power over its interlocutory orders. Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2nd Cir. 1962).

It is important to note that this Court has consistently voiced its preference for the Texas authorities devising a plan for judicial elections consistent with the Voting Rights Act, with reasonable dispatch, and therefore has considered and styled its January 2, 1990 injunction as an interim plan. The Order is, of course, binding and effective if, and to the extent, the Legislature fails to act. If the Legislature devises an acceptable plan under the Voting Rights Act this lawsuit, and the Court's injunction along with it, would likely become moot. Of course, an argument could be

made that this Court's interim plan of redistricting, because conditional in this sense, is not a judgment at all until the contingency has been removed, and therefore is not even appealable. In any event, this Court's overall plan of encouraging legislative redistricting is, the Court believes, relevant to considering, under the law of Rule 62(c), what constitutes a modification of an injunction "in aid of appeal."

In sum, the Federal Rules of Civil Procedure do not seem to provide a neat category for classifying motions on equitable remedies such as the one at issue. This Court is of the opinion that the Attorney General's Motion is one properly brought under Rule 59(e) because this Court's Order of January 2, 1990 is a "judgment" within the meaning of Rule 54(a). However, in the event this characterization is error, as Judge Wood seems to contend it is, the Court believes it proper to apply the more restrictive analysis under Fed. R. Civ. P. Rule 62(b) as set out in cases cited by the parties.

II. Alternatively, This Court Possesses Jurisdiction to Make Modifications to Its January 2, 1990 Order as Ordered Herein Pursuant to Rule 62(b), Fed. R. Civ. P.

Judge Wood challenges this Court's jurisdiction to entertain a motion to modify its January 2, 1990 Order, and presumably as well the Court's jurisdiction to modify said Order sua sponte. However, despite Judge Wood's artful choice of quotations from pertinent case law, the Court is not persuaded that it lacks jurisdiction to make certain changes in its Order even if the injunction contained therein is properly on appeal.

Once appeal is taken from an interlocutory judgment (as the Court assumes for discussion purposes that it has been here), Fed. R. Civ. P. 62(c) provides that "the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal" The scope of this Court's power under Rule 62(c) has most recently been the subject of analysis by the Fifth Circuit in Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989). Under the holding in Coastal, this Court is definitely constrained insofar as it lacks authority to dissolve the injunction on appeal. Id. at 821. But regarding less radical modifications, the Court is directed to limit the exercise of its power to "maintaining the status quo." Id. at 820.

Judge Wood would have the Court interpret "maintaining the status quo" to mean that this court may do nothing except "in aid of the appeal." Willie v. Continental Oil Co., 746 F.2d 1041 (5th Cir. 1984). The Fifth Circuit applied this directive in Willie to divest the District Court of jurisdiction to modify a judgment under Rule 60(b) because of inadvertence or excusable neglect, where substantive rights of the parties were at stake. Id. at 1045. In Willie, the parties sought to have the District Court correct its judgment to incorporate a mistakenly-omitted stipulation regarding the percentage of liability to be borne by one of the defendants. The District Court was empowered to deny such a motion because denial would be "in furtherance of the appeal." But had the District Court wished to grant the Rule 60(b) motion, leave of the Court of Appeals would have been required. Id. at 1046.

In the Coastal case, however, the Fifth Circuit seemed to impose a different standard of "maintaining the status quo," and defining that

standard to mean that a district court may not take action, such as vacating an injunction, that would presumably divest the court of appeals from jurisdiction while the issue is on appeal. Coastal, supra, at 820. Cases cited in the Coastal opinion consistently deal with granting or staying injunctions during the pendency of appeal. Id. Consistent with the analysis expressed in the Attorney General's brief, this Court interprets Coastal to say that it may not vacate the injunction now in issue while it is on appeal. No such action is contemplated.

Even if the "in aid of appeal" standard set out in Willie should guide the Court, it would seem that the modifications now ordered, which primarily give the Legislature additional time to consider redistricting, does not violate that standard.

Accordingly, this Court's Order of January 2, 1990 will be amended.

IT IS ORDERED that this Court's Order of January 2, 1990 be, and is hereby amended pursuant to the following directive only.

Item numbered "6" at pages 6 and 7 is amended to read as follows:

6. Elections shall take place on November 6, 1990 with runoff elections, if and where necessary, on December 4, 1990.

Item numbered "7" at page 7 is amended to read as follows:

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on September 19, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

IT IS FURTHER ORDERED that any rights of expedited appeal granted in this matter be, and are hereby RESCINDED.

SIGNED AND ENTERED this 11th day of January, 1990.

/s/
LUCIUS D. BUNTON
CHIEF JUDGE

JAN 17 1991

JOSEPH F. SPANIOL, JR.
CLERK

4
NO. 90-974

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, *et al.*,

and

JESSE OLIVER, *et al.*,
Petitioners,

v.

JIM MATTOX, *et al.*,
Respondents.

**HARRIS COUNTY DISTRICT JUDGE SHAROLYN
WOOD'S BRIEF IN OPPOSITION TO
LULAC ET AL., AND JESSE OLIVER, ET AL.'S
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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District Judge Sharolyn Wood*

QUESTIONS PRESENTED

1. Whether elected state judges are "representatives" within the scope of § 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(b), and, if so, whether § 2(b) is constitutional as thus interpreted?
2. Whether independent overlapping county-wide judicial election districts are within the scope of § 2(b) of the Voting Rights Act and, if so, whether § 2(b) is constitutional?

II

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NO. 90-974

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS, *et al.*,

and

JESSE OLIVER, *et al.*,
Petitioners

v.

JIM MATTOX, *et al.*,
Respondents.

**HARRIS COUNTY DISTRICT JUDGE SHAROLYN
WOOD'S BRIEF IN OPPOSITION TO
LULAC ET AL., AND JESSE OLIVER, ET AL.'S
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Respondent Harris County District Judge Sharolyn Wood ("Judge Wood") files this Brief in Opposition to the League of United Latin American Citizens ("LULAC"), *et al.* and Jesse Oliver, *et al.*'s Petition for a Writ of Certiorari to urge that the writ not be granted since the *en banc* judgment of the Fifth Circuit Court of Appeals is correct. In the alternative, Judge Wood urges

that all and only those issues properly presented in the record of this case be reviewed by this Court.¹

OPINIONS BELOW

Judge Wood incorporates by reference the statement of Opinions and Judgments Below set out in her Brief in Opposition to Houston Lawyers' Association's ("HLA" 's) Petition for Writ of Certiorari, No. 90-813, at 2. The opinions and judgments below are reproduced in the Appendix filed by the HLA, hereinafter referred to as "Pet. App."²

JURISDICTION

Judge Wood incorporates by reference the statement of jurisdiction set out in her Brief in Opposition to HLA's Petition at 2.

STATUTES INVOLVED

Judge Wood incorporates by reference the statement of Constitutional Provisions and Statutes Involved set out in her Brief in Opposition to HLA's Petition at 3.

STATEMENT OF THE CASE

Judge Wood incorporates by reference the Statement of the Case set out in her Brief in Opposition to HLA's Petition at 3-10.

1. Judge Wood has previously filed a Brief in Opposition to the Petition for Writ of Certiorari filed in this case by the Houston Lawyers' Association ("HLA"), No. 90-813. The HLA was a Plaintiff/Intervenor in this case, in which LULAC, *et al.* were the original Plaintiffs and Jesse Oliver, *et al.* were Plaintiff/Intervenors. Judge Wood urges that No. 90-813 and this Petition be consolidated and considered together. The parties are the same for both Petitions and are listed in Judge Wood's Opposition to the HLA's Petition at II-III.

2. LULAC did not file a separate Appendix.

REASONS FOR DENYING THE WRIT

1. Petitioners Incorrectly Claim That This Case Presents A Conflict With Decisions Of This Court.

Judge Wood incorporates by reference the statement of Reasons for Denying the Writ set out in her Brief in Opposition to HLA's Petition for Writ of Certiorari at 11 and adds the following arguments.

LULAC bases its principal argument for certiorari on the claim that the *en banc* decision of the Fifth Circuit Court of Appeals in this case conflicts with this Court's summary affirmance of two district court cases applying § 5 of the Voting Rights Act, 42 U.S.C. § 1973, to judicial elections, *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901, 106 S. Ct. 3268 (1986), and *Georgia State Bd. of Elecs. v. Brooks*, No. 288-146 (S.D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990). Pet. at 11. Petitioners base their claim on the artful phrasing of the question in *Brooks* as "Whether the Voting Rights Act Should Be Construed to Apply to the Election of Judges." Pet. at 13. Petitioners overreach themselves, however, in arguing that this Court's summary affirmance of *Brooks* has somehow decisively settled the legal issue of the applicability of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, to the judiciary. Pet. at 13.

No matter how Pretitioners phrase the issue in *Brooks*, this Court accords only limited *stare decisis* effect to summary affirmance, stating, "A summary disposition affirms only the judgment of the Court below and no more may be read into our action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 1568 n. 5 (1983); *see also Davis v. Bandemer*, 478 U.S. 109, 121, 106 S. Ct.

2797, 2804 (1986) (summary disposition of an issue does not preclude further consideration of important issues). The *stare decisis* effect of *Brooks* is therefore limited to the facts of *Brooks*—a § 5 preclearance case. *Brooks* does not present any binding precedent in this case, and it does not preclude this Court's review of the important § 2 issues presented.

Apart from the effect of a summary affirmance by this Court, however, Petitioners appear to argue that the district court decisions in *Brooks* and *Haith* in themselves create a conflict with the Fifth Circuit's decision in this case. The basis of the conflict is apparently the claim that if § 5 applies to the judiciary, § 2 must apply. Indeed, Petitioners argue that, "Given the identical language in Sections 2 and 5, basic tenets of statutory construction require that the sections be given identical meaning." Pet. at 12. They argue that because § 5 was accorded the "broadest possible scope" by this Court in *Allen v. State Bd. of Elecs.*, 393 U.S. 544, 566-567 (1969), § 2 must similarly be accorded the broadest possible scope. Pet. at 13. Both claims are false. The applicability of § 5 of the Voting Rights Act to judicial elections was neither challenged nor disputed in this suit. Moreover, the attempt to equate §§ 2 and 5 is misleading and fallacious, as the Fifth Circuit recognized in its *en banc* majority opinion, stating that the application of § 5 of the Voting Rights Act to judicial elections does *not* entail the application of § 2 as well. Pet. App. at 29a.

In fact, the referenced language of §§ 2 and 5 cited by Petitioners as "identical"—and therefore requiring the same construction—is *not* identical. Section 5 requires that certain specific states preclear with the Justice Department

any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1972.

42 U.S.C. § 1973c, Pet. at 4. Section 2 makes illegal any illegal any

voting qualification or prerequisite to voting, or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

42 U.S.C. § 1973, Pet at 2-3. This difference in language makes is clear that the two section have completely different thrust and scope; and, indeed, both the legislative history of the 1982 amendments to the Voting Rights Act and Supreme Court authority expressly caution against the fallacy of equating §§ 2 and 5.

In its official statement for the record of the intended meaning and operation of the 1982 amendments to the Voting Rights Act, Congress stated that the analogy between §§ 2 and 5 is "fatally flawed for several reasons." S. Rep. 417, 97th Cong., 2d Sess. 42, *reprinted* in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 219-220. Congress explained that there is a "fundamental difference" between "the degree of jurisdiction needed to sustain the extraordinary nature of preclearance" required by § 5 and "the use of a particular legal standard to prove discrimination" under § 2. *Id.* at 220. In its view,

section 2 . . . is less intrusive on state functions. As Justice Powell has stated "(p)reclearance involves a broad restraint on all state and local voting practices. . . ." *City of Rome v. United States*, 446 U.S. at 202-

203, n. 13 (Powell, J. dissenting). By contrast, amended section 2 does not require federal preclearance of anything it merely prohibits practices that can be proven in a court of law to have discriminatory results.

Id. (quoting testimony of Professor Dorsen). At the same time, Congress expressed its intent and confidence that § 2 cannot result in “wholesale invalidation of electoral structures,” which is, of course, the very result sought by Petitioners. *Id.* at 213.

Similarly, in the original Supreme Court case interpreting § 5, *South Carolina v. Katzenbach*, this Court cautioned,

We emphasize that only some of the many portions of the [Voting Rights] Act [of 1965] are properly before us. *South Carolina has not challenged §§ 2 . . . and other miscellaneous provisions having nothing to do with this lawsuit. Judicial review of these sections must await subsequent litigation.*

383 U.S. 301, 316, 86 S. Ct. 803, 812 (1966) (emphasis added). Thus the language of the Voting Rights Act and Congress indicate that §§ 2 and 5 should not be accorded identical scope, and this Court has specifically reserved the question.

Moreover, to the extent either section is to be employed in interpreting the other, the Justice Department, in codifying its responsibilities pursuant to § 5, 42 U.S.C. § 1973c, requires that the interpretation of § 2 (and other sections of the Voting Rights Act) be used as a guideline in interpreting § 5, not—as Petitioners would have it—vice versa. The Code of

Federal Regulations sets out specific guidelines for the Attorney General to follow “in making substantive determinations under section 5 and in defending section 5 declaratory judgment actions.” 28 C.F.R. (7-1-89 Ed.) Ch. 1 § 51.51. Those regulations provide:

(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), section 2, 4(a) 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgement on account of race, color, or membership in a language minority group.

28 C.F.R. (7-1-89 Ed.) Ch. 1 § 51.55. In other words, the Attorney General is to be guided in assessing the potentially discriminatory effect of changes in voting practices by the requirements of various provisions designed to safeguard the right to vote, including § 2. He is not to interpret those sections by reference to the broad language of § 5. The argument that § 2 must be accorded the broadest possible scope because § 5 has been accorded such scope is exactly the reverse of the procedure adopted by the Justice Department. Nevertheless, it is important to realize exactly what is at issue in this case—and it is *not* the full scope and applicability of § 2, much less the scope of §§ 2 and 5 together.

While the Petition leaves the impression that the Fifth Circuit held that § 2 does not ever apply to the judiciary, that is not the case. The Fifth Circuit, in fact, interpreted

only part of § 2 of the Voting Rights Act. Judge Gee in his majority opinion expressly observed that the court's inquiry was limited to the question whether the language in § 2(b) prohibiting discriminatory practices in the election of "representatives" could be applied to the judiciary. Pet. App. at 12a and 12a n. 6.³ The effect of this limitation, as the Court stated, was to restrict the Fifth Circuit's opinion to a ruling on the issue whether vote dilution claims can be brought in judicial elections. Pet. App. at 28a. The majority refused to decide whether § 2(b)'s prohibition of voting practices that result in a denial of a protected class' opportunity to participate in the political process applies to the judiciary, since that was not at issue. *Id.* However, the majority specifically indicated that

protecting [the opportunity to participate in the political process] appears to involve all of the primal anti-test, anti device concerns and prohibition of original Section 2; and its provisions may well extend to all elections whatever. These broader considerations center on the voter and on his freedom to engage fully and freely in the political process, untrammelled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, those safeguards may apply as in any other election, a matter not presented for decision today.

3. The relevant passage from the Act provides,

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political process leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have *less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.*

42 U.S.C. § 1973(b) (emphasis added).

Pet. App. at 12a-13a. The court further observed,

[A]s we have noted, *it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections*, as may the results test to claims other than those of vote dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in any electoral aspect.

Pet. App. at 28a (emphasis added). The Fifth Circuit's ruling is thus limited to one specific type of discrimination claim—although a very important one—the claim that the votes of a protected class can unintentionally be diluted through a state's structure of its judicial election system, in violation of § 2.

Since Petitioners' claims of a conflict between decisions of this Court and the Fifth Circuit opinion in this case rest on a fallacious equation of the scope of §§ 2 and 5 (the latter section not being at issue in this case) and overbroad readings of both the power of summary affirmance and the Fifth Circuit's *en banc* holding regarding the applicability of § 2(b)'s vote dilution prohibition to judicial elections, Petitioners' conflict claim is without merit and should be rejected as a basis for granting certiorari.

II. The Conflict Between *LULAC* and *Mallory v. Eyrich* Does Not Require Resolution By This Court.

While no conflict exists between this § 2 case and the two § 5 district court cases cited by Petitioners, there is, as Petitioners point out, a true conflict between this case

and *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). Pet. at 11. Petitioners analyze the conflict in terms of two issues on which *LULAC* and *Mallory* differ: (1) whether judges are “representatives” for purposes of the Voting Rights Act and (2) whether the non-applicability of the one person, one vote principle to judicial elections forecloses a vote dilution claim. Pet. at 14-18. Since both of these issues are thoroughly explored and far more effectively settled in the *LULAC* majority opinion, the conflict with *Mallory* does not require resolution by this Court.

The *en banc* Fifth Circuit opinion exposes the inherent fallacy in attempting to define judges as “representatives.” Pet. App. at 7a-19a. In that opinion, the Fifth Circuit majority began by observing that § 2 should not be pushed beyond its clear language “because of the highly intrusive nature of federal regulation of the means by which states select their own officials.” Pet. App. at 3a. Carefully examining the text of § 2 and its genesis, the court analyzed the background to the 1982 amendments to the Act, paying particular attention to the origin of the results test in legislative redistricting actions and to the traditional (indeed, prior to 1982, the universal) interpretation of the term “representative” by the courts as a term exclusive of the judiciary. Pet. App. at 5a-17a. It concluded that, in revising § 2 in 1982 to incorporate the “results” test promulgated in *Whitcomb v. Chavis*, 403 U.S. 124, 93 S. Ct. 1858 (1971) and *White v. Regester*, 412 U.S. 755, 93 S. Ct. 2332 (1973), Congress intended to extend that test no further than the legislative and executive branches and selected its language carefully to reach that result. Pet App. at 4a. Given the apparent care taken in the choice of the word “representative” in § 2(b),

it makes a mockery of customary canons of statutory construction to argue, as Petitioners do, that this careful specificity should give way to the general definition of the term "voting" in 42 U.S.C. § 1973l(c)(1).

The Fifth Circuit majority paid particular attention to *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973). *Wells* held that the one person, one vote principle does not apply to the judiciary since,

"Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.

"The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

Pet. App. at 18a (quoting *Wells*, 347 F. Supp. at 455-56). The Fifth Circuit stated,

It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming *Wells*, did not concur in that reasoning.

Pet. App. at 19a.

Petitioners, however, point out that while *Mallory*, like the Fifth Circuit Majority opinion in this case, accepts the rule in *Wells* that the one person, one vote principle does not apply to the judiciary, *Mallory* rejects *Wells'* reasoning that the principle does not apply because judges are not "representatives" covered by the principle. Instead,

Mallory holds that the one person, one vote principle addresses a fourteenth amendment equal protection problem, while analysis of a § 2 claim does not involve the fourteenth amendment but only statutory construction. Pet. App. at 17. This difference, Petitioners' argue, creates a conflict that this Court must resolve. *Id.* Neither Petitioners nor *Mallory* purport to explain *Mallory's* surrealistic rationale that a court can engage in statutory construction in some sort of constitutional vacuum without implicating the fourteenth amendment. Judge Wood respectfully suggests that *Mallory*, confronted by *LULAC*, fails as persuasive precedent without the need for this Court's intervention. No statutory construction is permissible that results in or leaves untouched a fourteenth amendment violation.

No review is required because the Fifth Circuit's analysis of the origin of § 2 lays to rest *Mallory's* purported distinction between § 2 and the fourteenth amendment. As the Fifth Circuit majority opinion points out, the concept of *individual* vote dilution was first developed by this Court in the legislative apportionment case of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), which provided a standard of measure and a remedy for individual vote dilution by promulgating the doctrine of one-person, one vote under the Constitutional authority of the Fourteenth Amendment. Pet. App. at 21a. Subsequently, the concept of one person, one vote provided the foundation for the concept of *minority* vote dilution elaborated in *Whitcomb* and *White*. Pet. App. at 21a. Thus, both the general concept of individual vote dilution and the specific concept of minority vote dilution are integrally related to the concept of one person, one vote. Moreover, *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct.

2752 (1986)—the only case in which this Court has reviewed the concept of minority vote dilution since the Voting Rights Act was amended in 1982—presupposes that the one person, one vote principle applies to elections covered by § 2 and builds into the test for vote dilution a potential remedy through the use of single member districts in which the aggrieved minority can constitute a majority.⁴

In light of *Reynolds*, *Whitcomb*, *White* and *Gingles*, the Fifth Circuit found itself compelled to conclude that vote dilution analysis can only be meaningful in cases in which the principle of one person, one vote applies. Indeed, it correctly observed that without the individual right of one person to one vote there is no standard of appropriate individual vote strength against which to measure alleged dilution; hence a court “can fashion no remedy to redress the non-existent wrong complained of here.” Pet. App. at 20a-21a. Thus, if a court acknowledges the holding in *Wells* that the one-person, one vote standard does not apply to the judiciary, it must logically conclude, as the Fifth Circuit did, that “judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members.” Pet. App. at 20a. If one person, one vote does apply, despite *Wells*, every state which elects judges must totally restructure its judicial electoral districts and hence its judiciary since, as discussed below, those districts are

4. As the Court is well aware, *Gingles* requires minority plaintiffs to meet an initial threshold burden of proving (1) that the minority is “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) that the minority is politically cohesive; and (3) that “the white majority votes sufficiently as a block to enable it, in the absence of special circumstances . . . usually to defeat the preferred candidate of the minority.” 458 U.S. at 50-51, 106 S. Ct. at 2766-2767.

currently crafted to reflect many different, legitimate concerns having nothing to do with minority voters or judges.

The Fifth Circuit's five-judge concurring opinion, authored by Judge Higginbotham, also points up the impossibility of devising a constitutional remedy for supposed vote dilution in the narrower field of district judge elections. Although Judge Higginbotham attributed the lack of remedy for perceived vote dilution in district judge elections to the fact that trial judges are sole decision-makers within their districts, rather than to the fact that trial judges are not "representatives" of their constituents' special interests, Pet App. at 92a, the broad conclusion reached by the concurring judges is essentially the same as that reached by the majority: application of the concept of vote dilution to an elected state judiciary is inconsistent with fundamental legal concepts and constitutional requirements.

As Judge Higginbotham points out, each trial judge is an official who exercises his full authority alone and whose authority has its source in an electorate coterminous with the jurisdiction of the court, so that there can be no dilution of votes for that sole decision-making office. Pet. App. at 93a. But, as Judge Higginbotham also acknowledges, the problem of applying the concept of vote dilution to trial judges does not stop there: "the fact that trial judges act singly is also integral to the linking of jurisdiction and elective base." Pet App. at 93a. Thus,

Saying that district judges in fact share a common office that can be subdistricted does not make it so. Nor does the assertion that function is not relevant make sense.

Id.

Judge Higginbotham points out numerous important interests involved in the structuring of state judicial election systems that would be profoundly affected by the application of the vote dilution principle and Petitioners' preferred remedy—subdistricting—to single-bench judicial districts. For example, in the larger Texas counties, although district courts are courts of general jurisdiction, some judges are elected specifically to handle only juvenile or family law or criminal cases. Pet. App. at 101a. This structure, like many others created over the decades to accommodate specialized docket needs, geographical considerations, or other reflections of non-racial functional specificity, would be complicated, if not precluded, by the creation of subdistricts designed solely to fulfill minority voter quotas. As Judge Higginbotham further argues, to break the linkage between jurisdiction and elective base may well *lessen* minority influence instead of increasing it. If there be any validity to Petitioners' claim that in some broad sense elected judges are representative of the voters who elect them, in a world of racially and ethnically structured sub-districts minority voters would have no influence on the election of most judges and, more likely than not, a minority litigant would be assigned to appear before a judge who was not elected from a district with greater than a 50% minority population. Pet. App. at 105a-107a. Further, requiring subdistricting to correct for vote dilution.

would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence—a core element of a judicial office. Trial judges would still exercise their full authority alone, but that authority would no longer come from the entire electorate within their

jurisdictional area. Subdistricting would result in decisions being made for the county as a whole by judges representing only a small fraction of the electorate.

Pet. App. at 108a. Judge Higginbotham concludes that this violence done the system not only would interfere with the state's fundamental right to structure its judiciary without federal interference but it might also retard the goals of the Voting Rights Act itself. Pet. App. at 111a.

The concerns expressed by Judge Higginbotham are not inconsequential considerations lightly arrived at, but extremely serious consequences to be reckoned with if § 2 of the Voting Rights Act is applied to the judiciary in general and to state district judge elections in particular. Respondent Wood and the Fifth Circuit majority would differ from Judge Higginbotham and those judges who concurred with him only by arguing that the violence done to the judiciary by application of § 2 vote dilution principles to those elections stems from an even more radical root than the fact that district judges are sole decision-makers whose authority is coterminous with their electoral base and jurisdiction: it stems from the non-representative nature of the judiciary. A state judiciary is either elected or appointed, as a state chooses, in order to serve the fundamental state interests of fairness and efficiency in the administration of justice and not at all to serve the special interests of any group of constituents, whether black or white, rich or poor, Jewish or Christian, residents of one neighborhood or residents of another. For that reason it necessarily does radical violence to the concept of an independent state judiciary, as well as to many constitutional and statutory principles, to insist that judicial districts be drawn solely to conform to demographic

distribution or to insure the proportional representation of minorities in the judiciary (which is ultimately the same thing). Judges are not representatives of their constituents, and judicial districts should not be structured to insure proportional racial representation.

Given the Fifth Circuit's decisive refutation of *Mallory*, it is not necessary for this Court to review the same issues. It should refuse to grant certiorari on the ground of a conflict between this case and *Mallory*.

III. Petitioners' Claim Of Authoritativeness For The United States Attorney General's Interpretation Of The Voting Rights Act, In Contrast To The Fifth Circuit's Interpretation, Is Erroneous And Presents No Ground For Certiorari.

Finally, Petitioners claim that the interpretation of the Voting Rights Act by the Attorney General, who appeared as amicus for the plaintiffs in this case, is authoritative. Pet. at 18. In support of their claim Petitioners cite *United States v. Board of Comm'rs of Sheffield, Ala.* 435 U.S. 110, 131 98 S. Ct. 965 (1978), in which this Court deferred to Attorney General Katzenbach's interpretation of § 5 of the Voting Rights Act on the ground that the Attorney General played an extensive role "in drafting the statute and explaining its operation to Congress." Pet. at 18. No one can contend that either the current Attorney General or Assistant Attorney General John Dunne, who has participated in this case as amicus, played a key role in drafting § 2 of the Voting Rights Act in 1965 or in amending it in 1982. Therefore the rationale for the deference paid by

this Court to Attorney General Katzenbach in 1978 entirely disappears. But there is a still more compelling reason for rejecting the argument that the United States Attorney General's interpretation of the Voting Rights Act is authoritative.

The Attorney General plays a statutorily mandated role in interpreting § 5 of the Voting Rights Act since he is required by law to preclear changes in voting practices and procedures in the affected states.⁵ By contrast, the United States Attorney General plays no necessary role in § 2 cases. Nor, as argued above, is the Attorney General accorded free rein to interpret even § 5 at his whim. Rather, stringent federal regulations prescribe in detail the procedure the Attorney General must follow in interpreting § 5, including deferring to guidelines established by constitutional and statutory provisions designed to safeguard the right to vote — provisions which include § 2. *See supra* at 7. Moreover, the same regulations which require the Attorney General to be guided by those provisions explicitly require him to be guided by the federal courts' interpretation of the relevant provisions.⁶ Thus, it is entirely wrong and misleading to assert that this or any federal Court must defer to the Attorney General's unilateral reading of § 5 when that Court is faced with interpreting the Voting Rights Act.

5. *See* 42 U.S.C. § 1973c, reprinted in Appendix to Judge Wood's Brief in Opposition to HLA's Petition ("Wood App.") at 4a; *see also* 28 C.F.R. (7-1-89) Ch. 1 § 51.51 *et seq.*

6. Applicable federal regulations provide in relevant part, § 51.56 Guidance from the courts.

In making determinations the Attorney General will be guided by the relevant decisions of the Supreme Court of the United States and of other Federal courts.

As an example on point, Assistant Attorney General Dunne this autumn refused preclearance of the creation of 15 new district judgeships in Texas, in part because he personally disagreed with the *en banc* decision in *LULAC*. See Opinion Letter of Assistant Attorney General John Dunne to Texas Elections Division. App. at 305a-307a. Petitioners the Houston Lawyers' Association introduced Attorney General Dunne's letter to the Texas Election Division into the record of this case as support for their claim (identical to *LULAC*'s claim) that the opinion of the Attorney General is authoritative *even* in § 2 cases in which the Attorney General is not a party and which present no § 5 issues. Subsequently the Mexican American Bar Association of Texas ("MABA") brought suit against the State of Texas before a three-judge court in the Western District of Texas seeking to enjoin the State from seating the new judges. That case was consolidated with a suit brought by the United States on the same issue. On December 26, 1990, the three-judge court ruled that the new benches had been precleared by operation of law before the Attorney General made his untimely objection. *Mexican Amr. Bar Ass'n of Texas v. State of Texas*, No. MO-90-CA-171 (W.D. Tex., Dec. 26, 1990). *MABA* by itself should lay to rest Petitioners' claim that the Attorney General's or the Assistant Attorney General's interpretation of the entire Voting Rights Act is final. Petitioners' argument that the *LULAC* opinion should be reviewed because the Attorney General disagrees with it is without merit and should be rejected by this Court.

IV. If The Court Grants Certiorari It Should Consider All And Only Those Issues Presented By This Case.

For the foregoing reasons, this Court should deny certiorari to review the scholarly and thorough *en banc* opinion of the Fifth Circuit Court of Appeals in this case. Nevertheless, Judge Wood recognizes the validity of Petitioners' final argument that fundamental rights are at issue in this case — although she would frame those issues in a larger context than the single, admittedly fundamental, issue of voting rights. Pet. at 19-20. Not only are voting rights at issue, but also fundamental principles of due process, equal protection, the applicability or inapplicability of the one man, one vote principle to judicial elections and the fundamental right of a state to structure its judiciary. Judge Wood has already explored briefly these and other issues presented by the case in her Brief in Opposition to HLA's Petition and hereby incorporates those arguments by reference. She therefore recognizes that the Court may well decide that certiorari is justified. In that event, she urges the Court to confine its review to the profound issues properly raised by this case and argued below and not to cloud those issues by granting certiorari to review other issues and other Voting Rights Act cases when and if it reviews this case.

CONCLUSION

For the foregoing reasons, Harris County District Judge Sharolyn Wood respectfully requests that the Court deny the Petition for Writ of Certiorari or, in the alternative, that it grant certiorari to review all and only those issues fairly presented by this case and developed below.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

**On Writs of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

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7. Answer of Jim Mattox, et al., to Second Amended Complaint of LULAC, et al.	102a
8. First Amended Answer of Judge F. Harold Entz to Second Amended Complaint of LULAC, et al. . .	112a
9. Answer of Judge F. Harold Entz to Complaint in Intervention of Jesse Oliver, et al.	119a
10. Answer of Jim Mattox, et al., to Complaint in Intervention of Houston Lawyers' Assoc., et al. .	126a
11. Trial Exhibit No. 1 of Judge Sharolyn Wood . . .	132a
12. Trial Exhibit No. 2 of Judge Sharolyn Wood . . .	139a
13. Motion to Intervene of Judge Tom Rickhoff, et al.	146a
14. Response of Jim Mattox, et al., to Motion to Intervene of Tom Rickhoff, et al.	157a
15. Order of January 2, 1990.	158a
16. Order of January 11, 1990	180a



RELEVANT DOCKET ENTRIES

Date	No.	Description
7/11/88	1	Complaint filed and 15 summonses issued (sm)
8/15/88	2	Amended complaint by LULAC-Council 4434, LULAC-Council #4451, Christina Moreno, Aquilla Watson, LULAC (Statewide) James Fuller, Matthew W. Plummer Sr. amending complaint [1-1] [Entry date 8/17/88]
9/27/88	7	Answer by William P. Clements, Jim Mattox, Jack M. Rains, Thomas R. Phillips, John F. Onion Jr., Joe E. Kelly, Joe B. Evins, Sam B. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II (sm)
11/30/88	17	Motion by Midland County to intervene (sm) [Entry date 12/1/88]
1/11/89	20	Motion by LULAC-Council 4434, LULAC-Council #4451. Christina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to dismiss as to defendant William Clements only (sm)
1/12/89	23	Order granting motion to dismiss as to defendant William Clements only [20-1] (sm)

1/23/89	24	Motion by Houston Lawyers Asso to intervene (sm)
1/23/89		Received Complaint in intervention of Houston Lawyers Association (sm)
1/30/89	28	Motion by Dist Jdgs of Travis with memorandum in support to intervene (sm) [Entry date 1/31/89]
1/30/89		Received answer of District Judges of Travis County (sm) [Entry date 1/31/89]
1/31/89	29	Motion by Fred Tinsley, Joan Winn White, Jesse Oliver to intervene (sm)
2/1/89	30	Response by Jim Mattox, Jack M. Rains, Thomas R. Phillips, John F. Onion Jr., Ron Chapman, thomas J. Stovall Jr., James F. Clawson Jr., Joe E. Ke'lly, Joe B. Evins, Sam B. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II to motion to intervene [24-1] (sm) [Entry date 2/2/89]
2/3/89	31	Response by LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to motion to intervene [24-1] (sm)
2/9/89	32	Response by Jim Mattox, Jac, M. Rains, Thomas R. Phillips, John F. Onion Jr., Ron Chapman, Thomas J. Stovall Jr., James F. Clawson Jr., Joe E. Kelly, Joe B. Evins, Sam B.

Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II to motion to intervene [29-1], motion to intervene [28-1] (sm)

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| 2/13/89 | 34 | Response by LULAC-Council 4434, LULAC Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to motion to intervene [28-1] (sm) |
| 2/13/89 | 35 | Response by LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. to motion to intervene [29-1] (sm) |
| 2/21/89 | 40 | Motion by Sharolyn Wood to intervene (sm) |
| 2/27/89 | 45 | Motion by F. Harold Entz to intervene (sm) |
| 3/6/89 | 50 | Order granting motion to intervene [45-1], granting motion to intervene [29-1], granting motion to intervene [28-1], granting motion to intervene, [24-1], granting motion to intervene, [17-1] (sm) [Entry date 3/7/89] |
| 3/21/89 | 55 | Answer by Sharolyn Wood to Houston Lawyers Assoc. (sm) |
| 3/21/89 | 56 | Answer to complaint by Sharolyn Wood against Legislative Black Caucus, LULAC-Council 4434, LULAC-Council #4451, Cristina |

Moreno, Aquilla Watson, LULAC (Statewide), James Fuller, Matthew W. Plummer Sr. (sm)

- | | | |
|---------|-----|---|
| 4/6/89 | 61 | Motion by Legislative Black Caucus to intervene as plaintiffs (sm) |
| 4/6/89 | | Received complaint in intervention of Legislative Black Caucus of Texas |
| 4/13/89 | 69 | Order granting motion to intervene as plaintiffs [61-1] (sm) |
| 5/12/89 | 85 | Second Amended Complaint by LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide) Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Mary Ellen Hicks, Rev. James Thomas (sm) |
| 5/24/89 | 100 | Answer of Jim Mattox, Jack M. Rains, Thomas R. Phillips, John F. Onion Jr., Ron Chapman, Thomas J. Stovall Jr., James F. Clawson Jr., Joe E. Kelly, Joe B. Evins, Sam B. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, Joe Spurlock II to Second Amended Complaint of LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide) Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. |

Hogrobrooks, Ernest M. Deckard,
Mary Ellen Hicks, Rev. James
Thomas (sm)

5/24/89	101	First Amended Answer of F. Harold Entz to Second Amended Complaint of LULAC-Council 4434, LULAC-Council #4451, Cristina Moreno, Aquilla Watson, LULAC (Statewide) Joan Ervin, Matthew W. Plummer, Sr., Jim Conley, Volma Overton, Willard Pen Conat, Gene Collins, Al Price, Theodore M. Hogrobrooks, Ernest M. Deckard, Mary Ellen Hicks, Rev. James Thomas (sm)
5/24/89	102	Answer of F. Harold Entz to complaint of Fred Tinsley, Joann Winn White, and Jesse Oliver
11/8/89	282	Memorandum Opinion and Order
11/27/89	286	Order granting in part and denying in part motion to alter or amend Order of November 8, 1989
12/22/89	293	Motion to Intervene of Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon Macrae, Michael P. Peden
12/26/89	302	Order granting Motion to Correct Clerical Mistake in Order of November 27, 1989
1/2/90	309	Order granting in part, denying in part Joint Motion for Entry of a Proposed Interim Plan, granting in part Motion

7a

to Certify the Opinion and Order of November 8, 1989 for Interlocutory Appeal, denying a stay in the proceedings, denying motion to intervene (sm)

1/11/90	331	Order amending order of January 2, 1990 (sm)
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

-----X
LEAGUE OF UNITED LATIN AMERICAN CITIZENS
(LULAC), *et al.*,

PLAINTIFFS

Houston Lawyers' Association
Alice Bonner, Weldon Berry, Francis Williams,
Rev. William Lawson, Deloyd T. Parker,
Bennie McGinty

PLAINTIFF-INTERVENORS

vs.

No. 88-CA-154

WILLIAM CLEMENTS, Governor of the State of
Texas, JIM MATTOX, Attorney General of the State
of Texas; JACK RAINS, Secretary of the State of
Texas, All in their official capacities;
THOMAS R. PHILLIPS; JOHN F. ONION, JR.;
RON CHAPMAN; THOMAS J. STOVALL, JR.; JAMES
F. CLAWSON, JR.; JOE E. KELLY; JOE B. EVINS;
SAM B. PAXSON; WELDON KIRK; CHARLES J.
MURRAY; RAY D. ANDERSON; JOE SPURLOCK II, All
in their official capacities as members of
the Judicial Districts Board of the State of Texas,

DEFENDANTS.

-----X

*COMPLAINT IN INTERVENTION**Introduction*

1. This action is brought by five Black registered voters and a membership organization of Black attorneys and registered voters in Harris County, Texas, who seek to intervene in MO 88 CA-154, *LULAC v. Clements*, for the purpose of protecting their interests as Black voters in being able to participate equally in the political process and elect candidates of their choice in Harris County district judge elections. They allege that the at large judicial electoral districts scheme as currently constituted, denies Black citizens an equal opportunity to elect the candidates of their choice, in violation of section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments of the United States Constitution. They also allege that Art. 5, §7(a)i of the Constitution of the State of Texas was adopted with the intention, and/or has been maintained for the purpose of minimizing the voting strength of Black voters, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, 42

U.S.C. §1983 and section II of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973. Plaintiff-intervenors seek declaratory and injunctive relief enjoining the continued use of the current judicial electoral districts scheme.

Jurisdiction

2. This Court has jurisdiction pursuant to 28 U.S.C. 1331 and 1343 and 42 U.S.C. § 1973j(f). This is an action arising under the statutes and Constitution of the United States and an action to enforce statutes and constitutional provisions that protect civil rights, including the right to vote.

3. Plaintiffs seek declaratory and other appropriate relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

Parties

4. Plaintiff-intervenor Houston Lawyers' Association is a member organization of seventy Black attorneys who reside in the Harris County area, each of whom is a registered voter, qualified to vote for district judges in Harris County. As part of its organizational mission, the Houston Lawyers'

Association has worked to promote the fair representation of Blacks in the judiciary in Harris County.

5. Plaintiff-intervenor Weldon Berry is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote, and is qualified to vote for district judges in Harris County. He was an appointed district judge who lost in an at large election in Harris County, Texas.

6. Plaintiff-intervenor Francis Williams is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote and is qualified to vote for district judges in Harris County. He was an appointed district judge who lost in an at large election in Harris County, Texas.

7. Plaintiff-intervenor Alice A. Bonner is an adult Black citizen of the United States who resides in Harris County, Texas. She is registered to vote, and is qualified to vote for district judges in Harris County. She was an appointed district judge who lost in an at large election in Harris County, Texas.

8. Plaintiff-intervenor William Lawson is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote, and qualified to vote for district judges in Harris County.

9. Plaintiff-intervenor Deloyd T. Parker, Jr. is an adult Black citizen of the United States who resides in Harris County, Texas. He is registered to vote, and qualified to vote for district judges in Harris County.

10. Plaintiff-intervenor Bennie McGinty is an adult Black citizen of the United States who resides in Harris County, Texas. She is registered to vote, and qualified to vote for district judges in Harris County.

11. Defendant William Clements is a white adult resident of the State of Texas. He is sued in his official capacity as Governor of the State of Texas. In his capacity as Governor, defendant Clements is the chief executive officer of the state and as such is charged with the responsibility to see that the laws of the State are faithfully executed.

12. Defendant Jack Rains is a white adult resident of the State of Texas. He is sued in his official capacity as

Secretary of State of the State of Texas. In his capacity as Secretary of State, he is the chief elections officer of the state and as such is charged with the responsibility to administer the election laws of the state. The Secretary of State is further empowered under the Texas Election Code, Section 31.005, to take appropriate action to protect the voting rights of the citizens of Texas from abuse.

13. Defendant Jim Mattox is a white adult resident of the State of Texas. He is sued in his official capacity as Attorney General of the State of Texas. In his capacity as Attorney General he is the chief law enforcement officer of the state, and as such is charged with the responsibility to enforce the laws of the state.

14. Defendants Thomas R. Phillips, John F. Onion, Ron Chapman, Thomas J. Stovall, James F. Clawson, Jr., Joe E. Kelly, Joe B. Evins, Sam M. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, and Joe Spurlock, II, are members of the Texas Judicial Districts Board, which was created by Art. 5, Sec. 7a of the Texas Constitution in 1985. The Judicial Districts Board is required to enact statewide

reapportionment if the legislature fails to do so, after each federal decennial census. In addition to statewide reapportionment, the Judicial Districts Board may reapportion the judicial districts of the state as the necessity arises in its judgment. The Judicial Districts Board is comprised of twelve *ex officio* members, and one lawyer member appointed by the Governor of the State of Texas. No member of the Texas Judicial Districts Board has ever been Black.

Factual Allegations

15. Texas has a history of official discrimination that touched the right of Black citizens to register, to vote, and otherwise to participate in the democratic process.

16. Primary elections were restricted to whites in Texas until a Black resident of Houston successfully challenged this discriminatory practice before the Supreme Court of the United States in 1944.

17. The Texas Legislature created a state poll tax in 1902 which helped to disenfranchise Black voters until the use of poll taxes was outlawed by the Supreme Court of the United

States in 1966.

18. It has been estimated that the poll tax and white primary reduced the number of Blacks participating in Texas elections from approximately 100,000 in the 1890's to 5,000 by 1906.

19. The State of Texas, and its political subdivisions are covered by Section 5 of the Voting Rights Act of 1965, as amended, the special administrative preclearance provision for monitoring all State and local voting changes.

20. Elections in Texas in general, and Harris County in particular, are characterized by significant racial bloc voting. In such elections, white voters generally vote for white candidates and Black voters generally vote for Black candidates. The existence of racial bloc voting dilutes the voting strength of Black voters where they are a minority of the electorate.

21. Texas has traditionally used, and continues to use unusually large election districts, particularly in large metropolitan areas such as Harris County, which have large concentrations of minority voters.

22. The political processes leading to nomination or election in Texas in general, and Harris County in particular, are not equally open to participation by Blacks, in that Blacks have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. For example, Black citizens continue to bear the effects of pervasive official and private discrimination in such areas of education, employment and health, which hinders their ability to participate in the political process.

23. According to the 1980 Census, Texas had a total population of 14,228,383. Blacks comprise approximately 12 percent of the State's population.

24. No Black attorney has ever served on the Texas Supreme Court or on the Texas Court of Criminal Appeals.

25. District judges in Texas are elected in an exclusionary at large numbered place system.

26. Only 2% of district judges in Texas are Black. One (1) percent of the State's appellate justices are Black.

27. Harris County is made up of 27 cities in southeastern

Texas, of which Houston is the largest. Houston is the largest city in Texas. The population of Houston is approximately 1,728,910. The Black population of Houston is 440,346.

28. Harris County covers 1,723 square miles. According to the Texas Data Center, in 1987 the population of Harris County was 2,782,414. Blacks comprise approximately 19.5% of the Harris County population.

29. The voting age population of Harris County is 1,685,081. Eighteen (18) percent of the voting age population in Harris County is Black.

30. Harris County is served by fifty-nine (59) district judges. This is the largest number of district judges of any judicial district in Texas. Harris County is also the largest judicial district by population.

31. In recent years Black candidates have run for district judge in almost every general election in Harris County, yet only 4 judges out of 59 (6.7% of the district judges), are Black.

32. In the November 1988 General Election for example,

six Black candidates ran for twenty-five (25) contested district judge positions. All six Black candidates lost, despite overwhelming Black voter support. Similarly, in the November 1986 General Election, of ten Black candidates who ran in twenty (20) contested races, eight lost, despite overwhelming support from Black voters.

33. Justices of the Peace are elected from single member precincts within Harris County. There are 2 Black Justices of the Peace in Harris County, elected from a precinct with a majority Black voting age population.

34. There is a substantial degree of residential segregation by race in Harris County.

35. Blacks in Harris County are a politically cohesive, geographically insular minority and the judicial candidates they support are usually defeated by a bloc voting white majority.

36. Plaintiff-intervenor reallege the contents of paragraphs of 11-29 of Plaintiffs' First Amended Complaint, as they relate to Harris County, Texas.

37. In 1985, Art. 5 §7 of the Texas Constitution of 1876

was amended to include §7(a), which created the Judicial Districts Board and provided in relevant part that:

The legislature, the Judicial Districts Boards, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this Section. Vernon's Ann. Tex. Const. Art. 5, §7(a)i.

38. Prior to the 1985 amendment, the Texas Constitution provided that "The State shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law." Art. 5, §7, Texas Constitution of 1876.

39. Although all counties in Texas have more than one district judge, no county in Texas holds elections for single member judicial districts. All districts judges in Texas run in exclusionary at large, winner take all, numbered place elections.

40. This electoral practice dilutes the voting power of politically cohesive, geographically insular communities of Black voters which could constitute effective voting majorities in single member districts.

41. Using 1980 census figures, it would be possible to draw at least eleven single member geographically compact districts of equal population in which the majority of the voting age population is Black.

42. In the alternative, the failure to use a non-exclusionary at large election system for district judges, dilutes the voting strength of Black voters. The use of a non-exclusionary at large voting system could afford Blacks an opportunity to elect judicial candidates of their choice. For example, under an at large system utilizing limited or cumulative voting, Black voters would have a more equal opportunity to elect district judges.

Allegations Regarding Intervention

43. On July 11, 1988 plaintiffs filed an action on behalf of Mexican-American and Black plaintiffs challenging the district judges schemes in forty-four (44) counties throughout Texas, including Harris County.

44. Plaintiff-intervenors seek to intervene in this action, pursuant to Rule 24 (a) of the Fed. Rule Civ. Procedure, in order to protect the interests of Black plaintiffs in the Harris

County area, who will be affected by a decision in this case. They are entitled to intervene as a matter of right because their application is timely, disposition of the action may impair or impede the ability of Black voters to protect their interest in ensuring that the method of electing district judges in Harris County is equally open to Black citizens, and the proposed-intervenors are not adequately represented by existing parties.

First Claim for Relief

45. Plaintiffs reallege the contents of paragraphs 1-42.

46. The present districting scheme for Texas district judges was adopted with the intention and/or has been maintained for the purpose of minimizing the political strength of Black voters in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution, section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §1973, and 42 U.S.C. § 1983.

Second Claim for Relief

47. Plaintiffs reallege the contents of paragraphs 1-42.

48. The present districting scheme for Texas district judges

has the result of making the political processes leading to nomination and election less open to participation by Black voters in that they have less opportunity than other citizens to elect the candidates of their choice, and thereby violates section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. §1973.

Relief

WHEREFORE, plaintiffs ask this Court to enter a judgment:

1. Granting plaintiffs request to intervene in this action;
2. Declaring that the present districting scheme for electing Texas district judges violates the Fourteenth and Fifteenth Amendments to the Constitution, section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, and 42 U.S.C. § 1983;
3. Ordering defendants to develop and establish a scheme for electing district judges that fully remedies the dilution of plaintiff-intervenors voting strength and provides Black voters with an equal opportunity to elect the candidates of their choice;

4. Granting plaintiff-intervenors their taxable costs in this action, necessary expenses of the litigation, and reasonable attorney's fees; and
5. Providing such other relief as the Court finds just.

Respectfully submitted,

January 19, 1988

[Caption]

COMPLAINT IN INTERVENTION**I. Introduction**

1. Intervenors/plaintiffs Jesse Oliver, Fred Tinsley and Joan Winn White ("Intervenors") are former state district judges of Dallas County, and are Black citizens of the State of Texas. They bring this action pursuant to 42 U.S.C. Section 1971, 1973, 1983 and 1988 to redress a denial, under color of state law, of rights, privileges or immunities secured to plaintiffs by the said laws and by the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Plaintiffs seek a declaratory judgment that the existing at large scheme of electing district judges in Dallas County of the State of Texas violates plaintiffs' civil rights in that such method illegally and/or unconstitutionally dilutes the voting strength of Mexican-American and Black electors; plaintiffs seek a permanent injunction prohibiting the calling, holding, supervising or certifying any future elections for

district judges under the present at large scheme in Dallas County; plaintiffs seek the formation of a judicial districting scheme by which district judges in the target counties are elected from districts are single member districts; plaintiffs seek costs and attorneys' fees.

II. Jurisdiction

3. Jurisdiction is based upon 28 U.S.C. 1343(3) and (4), upon causes of action arising from 42 U.S.C. Section 1971, 1973, 1983, and 1988, and under the Fourteenth and Fifteenth Amendments to the United States Constitution. Declaratory relief is authorized by 28 U.S.C. Section 2201 and 2202 and by Rule 57, F.R.C.P.

III. Plaintiffs/Intervenors

4. Plaintiffs Jesse Oliver, Fred Tinsley and Joan Winn White are Black citizens and registered voters of Dallas County, Texas. They are qualified to vote for district judges of Dallas County. Plaintiffs were appointed district judges who lost an at large election to a white opponent in Dallas County, Texas.

IV. Defendants

5. Defendant William Clements is the Governor of the State of Texas, and is the chief executive officer of the state and as such is charged with the responsibility to execute the laws of the state. Defendant Jim Mattox is the Attorney-General of the State of Texas, and is the chief law enforcement officer of the state and as such is charged with the responsibility to enforce the laws of the state. Defendant Jack Rains is the Secretary of State of the State of Texas, and is the chief elections officer of the state and as such is charged with the responsibility to administer the election laws of the state. Defendants Thomas R. Phillips, John F. Onion, Ron Chapman, Thomas J. Stovall, James F. Clawson, Jr., Joe E. Kelly, Joe B. Evins, Sam M. Paxson, Weldon Kirk, Charles J. Murray, Ray D. Anderson, and Joe Spurlock, II are members of the Judicial Districts Board created by Article V, Section 7a of the Texas Constitution, and pursuant to Article 24.941ff, Texas Revised Civil Statutes, have the duty to reapportion judicial districts within the State of Texas.

V. Factual Allegations

6. District judges are elected either from judicial districts which are coterminous with and wholly contained within a county, or from judicial districts which may be composed of several entire counties.

7. In those counties which contain more than one judicial district, the present election system is an at large scheme with the equivalent of numbered places, the majority rule requirement, and staggered terms.

8. The following counties upon information and belief, contain multiple judicial districts and a sufficiently compact minority population for the drawing of at least one majority combined minority single member district.

Harris	Lubbock
Dallas	Fort Bend
Ector	Smith
McClennan	Brazos
Tarrant	Brazoria
Midland	Taylor
Travis	Wichita
Jefferson	Angelina
Galveston	Gregg
Bell	

9. The above counties contain some 190 judicial

districts, and a combined minority population of almost 30%; however, only 10 or 5.3% of the 190 district judges are minority.

10. The following counties contain multiple judicial districts and sufficient Black population for the drawing of at least one majority-Black single member district:

Harris	Galveston
Dallas	Smith
Tarrant	Bell
Jefferson	McClennan
Travis	Gregg
Brazos	Fort Bend

11. The above counties contain some 164 judicial districts, and a Black population of 16.4%; however, only 7 or 4.3% of the 164 district judges are Black.

12. The following counties contain multiple judicial districts and sufficient Hispanic population for the drawing of at least one majority-hispanic single member district:

Harris	Ector
Tarrant	Lubbock
Galveston	Fort Bend
Dallas	
Travis	

13. The above counties contain some 148 judicial

districts, and a Hispanic population of 15.4%; however, only 4 or 2.7% of the 148 district judges are Hispanic.

14. The following judicial districts contain multiple counties and sufficient minority population for the drawing of at least one majority-minority single member districts:

<i>Judicial District</i>	<i>County</i>
81st, 218th	Atascosa, Frio, Karnes, LaSalle & Wilson
36th 156th, 343rd	Aransas, Bee, Live Oak, McMullen & San Patricio
22nd, 207th	Caldwell, Comal & Hays
24th, 135th, 267th	Calhoun, DeWitt, Goliad, Jackson, Refugio & Victoria
64th, 242nd	Castro, Hale & Swisher
34th, 205th, 210th	Culberson, El Paso & Hudspeth

15. The above counties contain some 15 judicial districts, and a combined minority population of 44.32%; however, only 1 or 6.7% of the 15 district judges is Black or Hispanic.

16. The following judicial districts contain multiple

counties and sufficient hispanic population for the drawing of at least one majority-hispanic single member district:

<i>Judicial District</i>	<i>County</i>
81st, 218th	Atascosa, Frio, Karnes, LaSalle & Wilson
36th, 156th, 343rd	Aransas, Bee, Live Oak, McMullen & San Patricio
24th, 135th, 267th	Calhoun, DeWitt, Goliad, Jackson, Refugio & Victoria
64th, 242nd	Castro, Hale & Swisher
34th, 205th, 210th	Culberson, El Paso & Hudspeth

17. The above counties contain some 13 judicial districts, and a hispanic population of 42.77%; however, only 1 or 7.7% of the 13 district judges is hispanic.

18. Upon information and belief, if single members districts were drawn in the above named areas, the minority group is sufficiently large and compact so that districts could be drawn in which minorities would constitute a majority.

19. Upon information and believe, in the above named areas minorities are politically cohesive.

20. Upon information and belief in the above cited areas, the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate running unopposed -- usually to defeat the minority's preferred candidate.

21. Upon information and belief, in the above challenged areas, the at large election scheme interacts with social and historical conditions to cause an in-equality in the opportunity of hispanic or black voters to elect representatives of their choice as compared to white voters.

22. Depending upon the evidence developed in discovery, some of the above named areas may be deleted and some unnamed areas may be added.

VI. Causes of Action

23. The present at large scheme of electing district judges, intentionally created and/or maintained with a discriminatory purpose, violates the civil rights of plaintiffs by diluting their votes.

24. The present at large scheme of electing district judges results in a denial or abridgement of the right to vote

of the plaintiffs on account of their race or color in that the political processes leading to nomination or election of district judges are not equally open to participation by plaintiffs in that they have less opportunity than other members of the electorate to elect candidates of their choice.

VII. Immunities

25. Qualified and absolute immunity do not protect the defendants because plaintiffs seek only injunctive and declaratory relief and attorneys' fees. Furthermore, absolute immunity does not protect defendants because they do not act in any of the capacities which receive immunity at common law. The defendants are not entitled to Eleventh Amendment immunity because plaintiffs seek only injunctive and declaratory relief and attorneys' fees.

VIII. Equities

26. Plaintiffs have no adequate remedy at law other than the judicial relief sought herein, and unless the defendants are enjoined from continuing the present at large scheme, plaintiffs will be irreparably harmed by the continuing violation of their statutory and constitutional

rights. The illegal and unconstitutional conditions complained of preclude the adoption of remedial provisions by the electorate. The present electoral scheme is without any legitimate or compelling governmental interest and is arbitrarily and capriciously cancels, dilutes and minimizes the force and effect of the plaintiffs' voting strength.

IX. Attorneys' Fees

27. In accordance with 42 U.S.C. Section 1973-1(e) and 1988, plaintiffs are entitled to recover reasonable attorneys' fees as part of their costs.

X. Prayer

28. WHEREFORE, premises considered, plaintiffs pray that defendants be cited to appear and answer herein; that a declaratory judgment be issued finding that the existing method of electing district judges is unconstitutional and/or illegal, null and void; that the defendants be permanently enjoined from calling, holding, supervising or certifying any further elections for district judges under the present at large scheme; that the Court order that district judges in the targeted counties be elected in a system which

contains single member districts; adjudge all costs against defendants, including reasonable attorneys' fees; retain jurisdiction to render any and all further orders that this Court may from time to time deem appropriate; and grant any and all further relief both at law and in equity to which these plaintiffs may show themselves to be entitled.

Respectfully submitted,

[Caption]

DEFENDANT HARRIS COUNTY DISTRICT JUDGE
SHAROLYN WOOD'S ORIGINAL ANSWER TO
HOUSTON LAWYERS' ASSOCIATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendants Sharolyn Wood, Judge of the
127th Judicial District Court of Harris County, Texas
("Wood") and, subject to her Motion to Dismiss and Motion
for More Definite Statement, files this her Original Answer
in response to the Complaint in Intervention of the Houston
Lawyers' Association, Alice Bonner ("Bonner"), Weldon
Berry ("Berry"), Francis Williams ("Williams"), Rev.
William Lawson ("Lawson"), Deloyd T. Parker ("Parker")
and Bennie McGinty ("McGinty") (hereinafter collectively
referred to as the "Houston Lawyers' Association Plaintiffs")
in the above referenced cause of action as follows:

I.

BACKGROUND

1.1. This is a suit originally brought by the League of
Latin American Citizens ("LULAC") and certain individual
Mexican-American and black citizens of Texas seeking to

declare illegal and/or unconstitutional and null and void in certain targeted counties the State of Texas' constitutionally and legislatively mandated system of electing state district judges at large.

1.2. The Texas Constitution Article V, § 7 provides in relevant part that the state shall be divided into judicial districts with each district having one or more judges as provided by law or by the Texas Constitution. The section also provides that each district judge shall be elected by the qualified voters at a general election and shall be a citizen of the state and shall have been a practicing lawyer in the state or a judge of a state court for four years and shall have been a resident of the district for two years and shall agree to reside in the district during his term of office.

1.3. In 1985, the Texas Constitution was amended by the addition of a new section, article V, § 7a, which provides for the reapportionment of Texas judicial election districts. That section provides that no judicial district may be established smaller than an entire county except by majority vote of the voters at a general election. Tex.

Const. of 1876, art. V, § 7a(i).

1.4. Pursuant to article V, the Texas legislature has enacted a comprehensive body of statutes governing the formation and function of judicial districts. The policy underlying the establishment of judicial districts is expressly stated in those statutes, to wit:

It is the policy of the state that the administration of justice shall be prompt and efficient and that, for this purpose, the judicial districts of the state shall be reapportioned as provided by this subchapter so that the district courts of various judicial districts have judicial burdens that are as nearly equal as possible.

Tex. Gov't Code § 24.945.

1.5. To promote the ends of fairness and efficiency, all the district courts in a county with more than one judicial district are accorded concurrent jurisdiction and courts in those districts are permitted to equalize their dockets. Tex. Gov't Code §§ 24.950, 24.951.

1.6. In addition, the Texas Government Code sets out rules and conditions for the reapportionment of judicial

districts.¹ Those statutes expressly require that the

¹ The Tex. Gov't Code provides,

(a) The reapportionment of the judicial districts of the state by the board is subject to the rules and conditions provided by Subsections (b)-(d).

(b) Reapportionment of the judicial districts shall be made on a determination of fact by the board that the reapportionment will best promote the efficiency and promptness of the administration of justice in the state by equalizing as nearly as possible the judicial burdens of the district courts of the various judicial districts. In determining the reapportionment that best promotes the efficiency and promptness of the administration of justice, the board shall consider:

(1) the numbers and types of cases filed in the district courts of the counties to be affected by the reapportionment;

(2) the numbers of types of cases disposed of by dismissal or judgment in the district courts of those counties;

(3) the numbers and types of cases pending in the district courts of those counties;

(4) the number of district courts in those counties;

(5) the population of the counties;

(6) the area to be covered by

a judicial district; and

(7) the actual growth or decline of population and district court case load in the counties to be affected.

(c) Each judicial district affected by a reapportionment must contain one or more complete counties except as provided by this section. More than one judicial district may contain the same county or counties. If more than one county is contained in a judicial district, the territory of the judicial district must be contiguous.

(d) Subject to the other rules and conditions in this section, a judicial district in a reapportionment under this subchapter may:

(1) be enlarged in territory by including an additional county or counties in the district, but a county having a population as large or larger than the population of the judicial district being reapportioned may not be added to the judicial district;

(2) be decreased in territory by removing a county or counties from the district;

(3) have both a county or counties added to the district and a county or counties removed from it; or

(4) be removed to another location in the state so that the district contains an entirely different county or counties.

(e) The legislature, the Judicial Districts

reapportionment of state judicial election districts be made on that basis which "will best promote the efficiency and promptness of the administration of justice in the state by equalizing as nearly as possible the judicial burdens of the district courts of the various judicial districts." The Code further sets out the factors to be considered in determining which reapportionment best promotes the efficiency and promptness of the administration of justice.

1.7. Not only are both race and racial discrimination entirely alien to Texas' judicial district reapportionment policy and the factors enumerated under it, but both the statement of policy itself and the enumerated factors to be considered make it absolutely clear that the fundamental state

Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this subsection. Judicial districts smaller in size than the entire county may be created subsequent to a general election in which a majority of the persons voting on the proposition adopt the proposition "to allow the division of _____ County into judicial districts composed of parts of _____ County." A redistricting plan may not be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county.

policy that determines the apportionment of judicial districts is the vitally important policy of promoting efficiency, promptness, and fundamental fairness in the administration of justice in Texas. Plaintiffs, however, would simply disregard this compelling state policy in the interests of increasing the numbers of protected minority class members in the state judiciary. Indeed, Plaintiffs expressly state that "the present electoral scheme is without any legitimate or compelling governmental interest and it arbitrarily and capriciously cancels, dilutes, and minimizes the force and effect of the Plaintiffs' voting strength." Plaintiffs' First Amended Complaint at ¶ 31.

1.8. Despite their claim that the present judicial election scheme is without any legitimate foundation, Plaintiffs state no claim against Texas' judicial election scheme in general. Rather, they complain that Texas' state judicial districts were established and/or are maintained in certain target counties with the intent to discriminate against minorities protected by § 2 of the Voting Rights Act, and that the district judge election scheme in those counties

dilutes the votes of blacks and Hispanics and thereby violates the Voting Rights Act, 42 U.S.A. §§ 1971 and 1973, the Civil Rights Act, U.S.C. §§ 1983 and 1988, and the fourteenth and fifteenth amendments to the United States Constitution. Plaintiffs' Complaint is essentially that when the target counties, which are widely scattered over the State of Texas, are considered as an aggregate, the proportional representation of black and/or Hispanic judges in those counties is less than the proportion of minorities in the gross population of those aggregated counties.

1.9. This suit initially challenged the judicial election system in 47 Texas counties.² By agreement between Plaintiffs and the State of Texas, approved by the Court on oral motion of the parties at a hearing on various motions to intervene on February 27, 1989, the number of targeted

² The counties targeted initially were Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Bell, Lubbock, Fort Bend, Brazos, Brazoria, Taylor, Wichita, Angelina, Gregg, Smith, Atascosa, Frio, Karnes, LaSalle, Wilson, Aransas, Bee, Live Oak, McMullen, San Patricio, Caldwell, Comal, Hays, Calhoun, DeWitt, Goliad, Jackson, Refugio, Victoria, Castro, Hale, Swisher, Culberson, El Paso, and Hudspeth.

counties was reduced to 15. These counties are Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Lubbock, Fort Bend, Smith, Culberson, El Paso, and Hudspeth.

II.

DEFENSES

2.1. Defendant Wood is without knowledge as to whether the individual Houston Lawyers' Association Plaintiffs are black registered voters as alleged in paragraph 1 of the Houston Lawyers' Association Plaintiffs' Complaint in Intervention (the "Houston Lawyers' Association Plaintiffs' Complaint") and, therefore, denies the same.

2.2. Defendant Wood specifically denies all other allegations in paragraph 1 of the Houston Lawyers' Association Plaintiffs' Complaint. In particular, she denies that the at large judicial electoral districts scheme as currently constituted denies black citizens an equal opportunity to elect the candidates of their choice in Harris County. She also specifically denies that Art. 5, § 7a(i) of the Texas Constitution was adopted with the intention, or has

been maintained for the purpose of, minimizing the voting strength of black voters.

2.3. Defendant Wood admits that this Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343. However, she denies that the Court has jurisdiction pursuant to 42 U.S.C. § 1973j(f), since that section provides jurisdiction only over causes of action brought under § 1973j to impose civil and criminal penalties on persons who violate various voting rights statutes, and Plaintiffs have not brought any action under § 1973j nor does § 1973j provide for any private cause of action.

2.4. Defendant Wood is without information sufficient to form a belief as to the characterization of the Houston Lawyers' Association in paragraph 4 of Houston Lawyers' Association Plaintiff's Complaint and the race and status of the individual Houston Lawyers' Association Plaintiffs as alleged in paragraph 5 through 10 and therefore denies them.

2.5. Defendant Clements has been dropped from this suit by Court order.

2.6. Defendant Wood is without knowledge or

information sufficient to form a belief as to the truth of the averments in paragraphs 11 through 14 of Houston Lawyers Association Plaintiffs' Complaint, except to the extent that those averments are admitted by the State Defendants. Defendant Wood denies, however, that the Judicial District Board may reapportion the judicial districts of Texas "as the necessity arises in its judgment" without regard to any other factors.

2.7. Defendant Wood makes no averments except with respect to Harris County. Insofar as Harris County is concerned, Defendant Wood is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 15 through 35 of the Complaint to which a responsive pleading may be required and therefore denies them.

2.8. In addition, in response to paragraph 20 of the Complaint, Defendant Wood specifically denies that elections in Harris County in particular are characterized by significant racial bloc voting.

2.9. Defendant Wood also specifically denies that the

State of Texas has used or continues to use unusually large election districts in Harris County; and she denies the implication in paragraph 21 of the Houston Lawyers' Association Plaintiffs' Complaint that the size of the judicial election districts in Harris County is in any way determined or influenced by the number of minority voters in the area.

2.10. Defendant Wood also specifically denies the allegations in paragraph 22 of the Houston Lawyers' Association Plaintiffs' Complaint that the judicial election process is not equally open to blacks, insofar as those allegations refer to Harris County.

2.11. Defendant Wood further specifically denies the allegations in paragraph 35 of the Houston Lawyers' Association Plaintiffs' Complaint that black judicial candidates in Harris County are usually defeated by a bloc voting white majority.

2.12. Defendant Wood denies the allegations incorporated by reference in paragraph 36 of the Houston Lawyers' Association Plaintiffs' Complaint insofar as a responsive pleading is required; and she refers the Houston

Lawyers' Association Plaintiffs to her First Amended Answer to Plaintiffs' First Amended Complaint.

2.13. Defendant Wood admits the allegations in paragraph 37 of the Houston Lawyers' Association Plaintiffs' Complaint that Art. 5, § 7 of the Texas Constitution of 1876 was amended in 1985 to include § 7(a), but she denies that the snippet quoted is meaningful by itself.

2.14. Defendant Wood admits the averments in paragraph 38 insofar as any responsive pleading is required.

2.15. Defendant Wood is without information to permit her to respond to the allegations in paragraphs 39 and 41 and therefore denies them.

2.16. In response to paragraphs 40 and 42 of the Complaint, and with respect to Harris County alone, Defendant Wood specifically denies that the present at large scheme of electing district judges violates the civil rights of the Plaintiffs by diluting their votes. She further denies that the present at large election scheme results in a denial or abridgement of the right of the Plaintiffs to vote on account of their race or color in that they have less opportunity than

other members of the electorate to elect candidates of their choice as alleged in paragraphs 22 and 48 of Houston Lawyers' Association Plaintiffs' Complaint. Intervenor Wood asserts that such condition or effect does not exist in Harris County with respect to the election of district judges. She also asserts that no violation of the Voting Rights Act or of the United States Constitution has occurred within Harris County with respect to the current method or scheme of electing district judges and that, therefore, no remedy is required or justified in order to alleviate a problem which does not exist within this county.

2.17. No responsive pleading is required to the Houston Lawyers' Association Plaintiffs' allegations regarding intervention in paragraphs 43 and 44 of their Complaint.

2.18. Defendant Wood denies the allegations in paragraphs 45 through 48 of the Houston Lawyers' Association Plaintiffs' Complaint. She specifically denies in addition, and with respect to Harris County alone, that the present districting scheme was adopted or has been

maintained with the intention of minimizing the political strength of black voters, as alleged in paragraph 46; and she specifically denies that the present scheme has the result of making the political process in Harris County less open to black voters.

II.

AFFIRMATIVE DEFENSES

A. Plaintiffs Lack Standing to Bring Their Claims (a) in Twelve of the Fifteen Target Counties and (b) in Each Already Identified Future Minority District in Which No Plaintiff Resides.

3.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1. through 2.18 as though fully restated.

3.2. Defendant Wood still urging and relying on the matters herein alleged, further alleges by way of affirmative defense that Plaintiffs lack standing to bring their claims of vote dilution in twelve of the fifteen counties which are targets of this suit in that no individual Plaintiff in this suit is a resident of any county except Harris, Midland, and Dallas. Thus, no decision of the Court regarding the

application of Texas' judicial district election scheme in any other county will affect any Plaintiff in this case. When no Plaintiffs will be affected by a decision regarding a claim, the Court lacks jurisdiction over that claim. Hence all claims as to the twelve unrepresented counties should be dismissed and the remaining case severed by county and transferred to the Federal District Court in such county.

3.3. In the alternative, the Court should join as indispensable parties individual voters in each target county as well as the district judges of those counties.

3.4. In addition, with respect to each of the eleven proposed judicial districts Plaintiffs have already identified in which no named Plaintiff is a resident, Plaintiffs lack standing to assert any claims.

B. *State Judicial Elections Are Beyond the Scope of the Voting Rights Act.*

4.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 3.4 as though fully restated.

4.2. Defendant Wood, still urging and relying on the

matters herein alleged, further alleges by way of affirmative defense that state judicial elections are beyond the scope of the Voting Rights Act in that the plain language of § 2 of the Voting Rights Act, as amended in 1982 and codified at 42 U.S.C. § 1973(b), limits the scope of the Act to elections of "representatives," not judges; and she alleges that the Voting Rights Act cannot be properly understood to require that judges, who serve the people rather than represent them, must be elected from single member districts drawn on racial lines, as Plaintiffs would require, in order to correct for the dilution of the votes of protected minority class members in multi-member judicial districts.

C. *The Voting Rights Act, as Amended, is Unconstitutional as Applied to Judicial Elections.*

5.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 4.2 as though fully restated.

5.2. Defendant Wood, still urging and relying on the matters herein alleged, would further alleges by way of affirmative defense that the Voting Rights Act, as amended

in 1982, is unconstitutional as applied to judicial elections.

5.3. Intentional discrimination is an essential element of a violation of the fourteenth and fifteenth amendments to the United States Constitution. The Voting Rights Act derives its constitutional validity from those two amendments and, in particular, from § 5 of the fourteenth amendment and § 2 of the fifteenth amendment, which grant to Congress the power to enforce the provisions of those amendments. Following a holding by the Supreme Court that the Voting Rights Act was violated only by purposeful discrimination, Congress amended § 2 of the Voting Rights Act to make it clear that a violation could be proved by showing discriminatory effect alone without showing a discriminatory purpose on the part of the state in adopting or maintaining a contested electoral mechanism.

5.4. The 1982 amendments to § 2 of the Voting Rights Act transgress the constitutional limitations within which Congress has the authority to interfere with state regulation of the local electoral process. Although Congress has the power under the fourteenth and fifteenth amendments

to pass statutes prohibiting conduct which does not rise to the level of a constitutional violation, it may not infringe any provision of the Constitution in doing so. Yet the Voting Rights Act, at least as applied to judicial elections, violates the principle of separation of powers underlying the United States and the Texas Constitution and the Equal Protection Clause of the fourteenth amendment in order to extend protections to protected minorities which are not themselves required by the Constitution.

5.5. The Equal Protection Clause of the fourteenth amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Voting Rights Act, as amended in 1982, is, however, expressly designed to force states to adopt measures as remedies for alleged vote dilution that favor protected classes over other classes and thus deprive members of nonprotected classes of the equal protection of the laws. Since Defendant Wood is not a member of a class protected by the Act, that Act, used to force the restructuring of state judicial election districts in

Harris County, Texas, would unconstitutionally deprive Defendant Wood of the equal protection of the laws.

5.6. Section 2 of the Voting Rights Act of 1965, as originally promulgated and enforced prior to 1982, did not expressly favor protected classes. The Act simply forbade any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. In 1975, the Act was amended to extend its protections to members of language minority groups.³ In 1982 it was amended once again; and this time its protections were expressly limited to "members of a protected class."⁴

³ As amended in 1975, the § 2 of the Voting Rights Act provided:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [i.e., guarantees protecting language minority groups].

⁴ Section 2 of the Voting Rights Act, as amended in 1982, provides:

5.7. Since the protections of § 2 of the Voting Rights Act as amended in 1982 are expressly extended to protected classes and not to others, the Voting Rights Act as amended is a race-based Act designed to further remedial goals. Therefore, its provisions are highly suspect and are to be treated by the courts with strict scrutiny so that they may

(a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of protected class elected in numbers equal to their proportion in the population.

determine whether its classifications are in fact motivated by racial politics, rather than by a more benign purpose, and whether those classifications carry the danger of leading to a politics of racial hostility.

5.8. Strict scrutiny reveals that the protections of § 2 of the Voting Rights Act, as amended can be invoked in a vote dilution case, such as the present case, only by a protected minority which is geographically insular and politically cohesive and votes as a racial block against a white majority, which also votes as a racial block and usually manages to defeat candidates preferred by the protected minority. In that situation -- and in that situation only -- the Voting Rights Act comes alive to ensure that the protected class will be allowed to elect the representatives of its choice, even if that protected class is in the minority in the challenged election district, and even if the challenge district's boundaries have been drawn for compelling state reasons having nothing to do with race. However, the Voting Rights Act does not protect the rights of any class of people other than those designated by the Act as protected

classes -- even if the unprotected class finds itself in the precise circumstances which would invoke the Act if the class were protected, namely, in a situation where the unprotected class constitutes a minority of voters within a given election district -- a situation which, on information and belief, prevails in much of Southern Texas.

5.9. Defendant Wood makes no allegations concerning the constitutionality of the Voting Rights Act in regard to matters other than judicial elections. However, in regard to judicial elections, Section 2 as amended is a preferential Act which, in the name of preventing discrimination, (a) is actually a device for encouraging and rewarding racial politics and implicitly the notion of race-conscious justice by forcing states to adopt measures to remedy "vote dilution" and (b) by ignoring the principal of "one man-one vote," to guarantee a disproportionately large number of minority judges committed to race-conscious justice. Both concepts would deprive nonprotected classes of the equal protection of the law. That Act therefore fails to meet the test of strict scrutiny and flagrantly violates the equal protection clause of

the Constitution.

5.10. Second, the Voting Rights Act, when extended to judicial elections, obliterates the distinction between legislators -- who represent the people and are properly representatives of the voters' personal interests (such as the voters' desire to have the interests of their racial or language group put foremost) -- and judges -- who serve the interests of all the people impartially and in the proper exercise of whose function the desires of the voters to promote racial identification have no proper role at all. When the Voting Rights Act is applied to judges, the proper distinction between the legislative and judicial function is sacrificed to the promotion of racial interests and any state in which it is so used is denied the opportunity to maintain the separation of the legislative and judicial function which is fundamental to the United States Constitution itself and to all state constitutions, including the Texas Constitution.

WHEREFORE, Harris County District Judge Sharolyn Wood respectfully requests that the Houston Lawyers' Association Plaintiffs' cause of action be dismissed with

respect to the system for electing district judges within Harris County and that judgment be entered in her favor and that she recover all other relief, both general and special, in law and in equity, to which she may show herself justly entitled.

III.

DEFENDANT WOOD'S COUNTERCLAIM

Harris County District Judge Sharolyn Wood, Defendant in the above-captioned action, now acting as and designated Counter-Plaintiff, complains of the Houston Lawyers' Association Plaintiffs, now designated Counter-Defendants, and for cause of action would show by way of counterclaim the following:

6.1. Counter-Plaintiff incorporates by reference the allegations in paragraphs 1.1 through 5.10 as though fully restated.

6.2. In connection with the controversy which is the subject of this cause of action, Counter-Defendants rely integrally on the constitutionality of the Voting Rights Act of 1965 as amended in 1982 and codified at 42 U.S.C.A. §

1973 (West Supp. 1988). Title 28 §§ 2201 and 2202 permit any interested party to seek a declaration of his rights and other legal relations in a case of actual controversy within its jurisdiction and to seek further necessary or proper relief based on a declaratory judgment. Therefore Counter-Plaintiff seeks a declaration of her rights vis-a-vis the amended Voting Rights Act under the United States Constitution.

6.3. For the reasons set forth above in paragraphs 4.1 through 4.2 and hereby incorporated by reference, Counter-Plaintiff alleges that state judicial elections are beyond the scope of the Voting Rights Act of 1965.

6.4. Alternatively, and still urging and relying upon the claim set forth herein, Counter-Plaintiff further alleges that, for the reasons set forth in paragraphs 5.1 through 5.10 and hereby incorporated by reference, the Voting Rights Act as amended in 1982 is unconstitutional as applied to judicial elections. It deprives non-protected classes of the equal protection of the law, in violation of the fourteenth amendment; and in addition, it deprives citizens of those

states in which it is invoked to force the redistricting of state judicial election districts of their right to a form of government in which the function of the judiciary as servants of the people is kept separate from the function of the legislature as representatives of the people. More specifically, its application in the ways sought by Plaintiffs would deprive Defendant Wood of her constitutional rights.

6.5. In that she seeks a declaration of her constitutional rights, Defendant Wood alleges that she is entitled to court costs and attorney's fees.

WHEREFORE, Counter-Plaintiff Wood respectfully prays that the Court will grant her relief as follows:

1. Declare that the Voting Rights Act of 1965, as amended in 1982, does not apply to judicial elections; or, alternatively,
2. Declare that the Voting Rights Act of 1965, as amended in 1982, is unconstitutional as applied to judicial elections; and
3. Dismiss all of Plaintiffs' claims; and
4. Award Counter-Plaintiff her just costs and

attorney's fees pursuant to 28 U.S.C. § 2202 and 42 U.S.C. § 1988; and

5. Award Counter-Plaintiff such other and further relief in law and in equity to which she may show herself to be justly entitled.

Respectfully submitted,

PORTER & CLEMENTS

By: /s/ J. Eugene Clements
[Caption]

*HARRIS COUNTY DISTRICT JUDGE SHAROLYN
WOOD'S FIRST AMENDED ORIGINAL ANSWER
AND COUNTERCLAIM TO PLAINTIFFS
LULAC, ET AL.*

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Sharolyn Wood, Judge of the 127th Judicial District Court of Harris County, Texas ("Wood") and, subject to her Motion to Dismiss and Motion for More Definite Statement, files this her First Amended Original Answer in response to the Plaintiffs' First Amended Complaint in the above-referenced cause of action as follows:

I.

BACKGROUND

1.1. This is a suit originally brought by the League of Latin American Citizens ("LULAC") and certain individual Mexican-American and black citizens of Texas seeking to declare illegal and/or unconstitutional and null and void in certain targeted counties the State of Texas' constitutionally and legislatively mandated system of electing state district judges at large.

1.2. The Texas Constitution Article V, § 7 provides in relevant part that the state shall be divided into judicial districts with each district having one or more judges as provided by law or by the Texas Constitution. The section also provides that each district judge shall be elected by the qualified voters at a general election and shall be a citizen of the state and shall have been a practicing lawyer in the state or a judge of a state court for four years and shall have been a resident of the district for two years and shall agree to reside in the district during his term of office.

1.3. In 1985, the Texas Constitution was amended by the addition of a new section, article V, § 7a, which provides for the reapportionment of Texas judicial election districts. That section provides that no judicial district may be established smaller than an entire county except by majority vote of the voters at a general election. Tex. Const. of 1876, art. V, § 7a(i).

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underlying the establishment of judicial districts is expressly stated in those statutes, to wit:

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1.5. To promote the ends of fairness and efficiency, all the district courts in a county with more than one judicial district are accorded concurrent jurisdiction and courts in those districts are permitted to equalize their dockets. Tex. Gov't Code §§ 24.950, 24.951.

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(5) the population of the counties;

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(7) the actual growth or decline or population and district court case load in the counties to be affected.

(c) Each judicial district affected by a reapportionment must contain one or more complete counties except as provided by this section. More than one judicial district may contain the same county or counties. If more

than one county is contained in a judicial district, the territory of the judicial district must be contiguous.

(d) Subject to the other rules and conditions in this section, a judicial district in a reapportionment under this subchapter may:

(1) be enlarged in territory by including an additional county or counties in the district, but a county having a population as large or larger than the population of the judicial district being reapportioned may not be added to the judicial district;

(2) be decreased in territory by removing a county or counties from the district;

(3) have both a county or counties added to the district and a county or counties removed from it; or

(4) be removed to another location in the state so that the district contains an entirely different county or counties.

(e) The legislature, the Judicial Districts Board, or the Legislative Redistricting Board may not redistrict the judicial districts to provide for any judicial district smaller in size than an entire county except as provided by this subsection. Judicial districts smaller in size than the entire county may be created subsequent to a general election in which a majority of the persons voting on the proposition adopt the proposition "to allow the division of _____ County into judicial districts composed of parts of _____ County." A redistricting plan

reapportionment of state judicial election districts be made on that basis which "will best promote the efficiency and promptness of the administration of justice in the state by equalizing as nearly as possible the judicial burdens of the district courts of the various judicial districts." The Code further sets out the factors to be considered in determining which reapportionment best promotes the efficiency and promptness of the administration of justice.

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may not be proposed or adopted by the legislature, the Judicial Districts Board, or the Legislative Redistricting Board in anticipation of a future action by the voters of any county.

disregard this compelling state policy in the interests of increasing the numbers of protected minority class members in the state judiciary. Indeed, Plaintiffs expressly state that "the present electoral scheme is without any legitimate or compelling governmental interest and it arbitrarily and capriciously cancels, dilutes, and minimizes the force and effect of the Plaintiffs' voting strength." Plaintiffs' First Amended Complaint at ¶ 31.

1.8. Despite their claim that the present judicial election scheme is without any legitimate foundation, Plaintiffs state no claim against Texas' judicial election scheme in general. Rather, they complain that Texas' state judicial districts were established and/or are maintained in certain target counties with the intent to discriminate against minorities protected by § 2 of the Voting Rights Act, and that the district judge election scheme in those counties dilutes the votes of blacks and Hispanics and thereby violates the Voting Rights Act, 42 U.S.A. §§ 1971 and 1973, the Civil Rights Act, U.S.C. §§ 1983 and 1988, and the fourteenth and fifteenth amendments to the United States

Constitution. Plaintiffs' Complaint is essentially that when the target counties, which are widely scattered over the State of Texas, are considered as an aggregate, the proportional representation of black and/or Hispanic judges in those counties is less than the proportion of minorities in the gross population of those aggregated counties.

1.9. This suit initially challenged the judicial election system in 47 Texas counties.² By agreement between Plaintiffs and the State of Texas, approved by the Court on oral motion of the parties at a hearing on various motions to intervene on February 27, 1989, the number of targeted counties was reduced to 15. These counties are Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Lubbock, Fort Bend, Smith, Culberson, El Paso, and Hudspeth.

² The counties targeted initially were Harris, Dallas, Ector, McLennan, Tarrant, Midland, Travis, Jefferson, Galveston, Bell, Lubbock, Fort Bend, Brazos, Brazoria, Taylor, Wichita, Angelina, Gregg, Smith, Atascosa, Frio, Karnes, LaSalle, Wilson, Aransas, Bee, Live Oak, McMullen, San Patricio, Caldwell, Comal, Hays, Calhoun, DeWitt, Goliad, Jackson, Refugio, Victoria, Castro, Hale, Swisher, Culberson, El Paso, and Hudspeth.

II.

DEFENSES

2.1. Defendant Wood acknowledges that the League of United Latin American Citizens ("LULAC") consists of statewide and local organizations composed primarily of United States citizens of Mexican descent as alleged in paragraphs 1, 4 and 5 of Plaintiffs' First Amended Complaint (the "Complaint"). However, she is without knowledge or information sufficient to form a belief as to the truth of the averments in the first paragraph of the Complaint about the citizenship and race of Plaintiffs Christina Moreno, Aquilla Watson, James Fuller, and Judge Matthew W. Plummer, Sr.

2.2. Paragraph 2 of the Complaint contains only averments to which no responsive pleading is required; however, to the extent that it is construed to contain averments requiring a responsive pleading, Defendant denies them.

2.3 To the extent that paragraph 3 of the Complaint is construed to contain averments to which responsive

pleadings are required, Defendant Wood admits the averment in paragraph 3 that the Court has jurisdiction over this action. She is without knowledge or information sufficient to form a belief as to whether each of the cited statutory provisions provides sufficient jurisdiction.

2.4. Defendant Wood is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs 4, 5, 6, 7, 8 and 9 of the Complaint. She is without knowledge or information sufficient to form a belief as to the averments in paragraph 10, except to the extent that those averments are admitted by the State Defendants.

2.5. Defendant Wood admits the averments in paragraph 11 and 12 of the Complaint.

2.6. Defendant Wood is without knowledge or information sufficient to form a belief as to the truth of the averments in the remaining paragraphs, 13-32, of the Complaint to which a responsive pleading may be required and therefore denies them.

2.7. In addition, in response to paragraph 26 of the

Complaint, Defendant Wood specifically denies that the at large judicial election system causes an inequality in the opportunity of black or Hispanic voters to elect representatives of their choice, since state district judges are not representatives of the electorate.

2.8. Defendant Wood makes no contention or assertions regarding any other county of the state except Harris County. However, in response to paragraphs 28 and 29 of the Complaint, and with respect to Harris County alone, Defendant Wood specifically denies that the present at large scheme of electing district judges violates the civil rights of the Plaintiffs by diluting their votes. She further denies that the present at large election scheme results in a denial or abridgement of the right of the Plaintiffs to vote on account of their race or color in that they have less opportunity than other members of the electorate to elect candidates of their choice. Defendant Wood asserts that such condition or effect does not exist in Harris County with the respect to the election of district judges. She also asserts that no violation of the Voting Rights Act or of the United

States Constitution has occurred within Harris County with respect to the current method or scheme of electing district judges and that, therefore, no remedy is required or justified in order to alleviate a problem which does not exist within this county.

2.9. Defendant Wood also denies, with respect to paragraph 31 of the Complaint, that Plaintiffs will be irreparably harmed by the continuing violation of their rights in Harris County since she denies that there are any such violations in Harris County. She further denies that the present electoral scheme in Harris County is without any legitimate or compelling government interest.

III.

AFFIRMATIVE DEFENSES

A. Plaintiffs Lack Standing to Bring Their Claims in Twelve of the Fifteen Target Counties.

3.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 2.18 as though fully restated.

3.2. Defendant Wood still urging and relying on the

matters herein alleged, further alleges by way of affirmative defense that Plaintiffs lack standing to bring their claims of vote dilution in twelve of the fifteen counties which are targets of this suit in that no individual Plaintiff in this suit is a resident of any county except Harris, Midland, and Dallas. Thus, no decision of the Court regarding the application of Texas' judicial district election scheme in any other county will affect any Plaintiff in this case. When no Plaintiffs will be affected by a decision regarding a claim the Court lacks jurisdiction over that claim. Hence all claims as to the twelve unrepresented counties should be dismissed and the case as to the remaining counties other than Midland should be severed and transferred to such counties.

3.3. In the alternative, the Court should join as indispensable parties individual voters in each target county as well as the district judges of those counties.

B. *State Judicial Elections Are Beyond the Scope of the Voting Rights Act.*

4.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1

through 3.3 as though fully restated.

4.2. Defendant Wood, still urging and relying on the matters herein alleged, further alleges by way of affirmative defense that state judicial elections are beyond the scope of the Voting Rights Act in that the plain language of § 2 of the Voting Rights Act, as amended in 1982 and codified at 42 U.S.C. § 1973(b), limits the scope of the Act to elections of "representatives," not judges; and she alleges that the Voting Rights Act cannot be properly understood to require that judges, who serve the people rather than represent them, must be elected from single member districts drawn on racial lines, as Plaintiffs would require, in order to correct for the dilution of the votes of protected minority class members in multi-member judicial districts.

C. *The Voting Rights Act, as Amended, is Unconstitutional as Applied to Judicial Elections.*

5.1. Defendant Wood hereby incorporates by reference the allegations heretofore made in paragraphs 1.1 through 4.2 as though fully restated.

5.2. Defendant Wood, still urging and relying on the

matters herein alleged, would further alleges by way of affirmative defense that the Voting Rights Act, as amended in 1982, is unconstitutional as applied to judicial elections.

5.3. Intentional discrimination is an essential element of a violation of the fourteenth and fifteenth amendments to the United States Constitution. The Voting Rights Act derives its constitutional validity from those two amendments and, in particular, from § 5 of the fourteenth amendment and § 2 of the fifteenth amendment, which grant to Congress the power to enforce the provisions of those amendments. Following a holding by the Supreme Court that the Voting Rights Act was violated only by purposeful discrimination, Congress amended § 2 of the Voting Rights Act to make it clear that a violation could be proved by showing discriminatory effect alone without showing a discriminatory purpose on the part of the state in adopting or maintaining a contested electoral mechanism.

5.4. The 1982 amendments to § 2 of the Voting Rights Act transgress the constitutional limitations within which Congress has the authority to interfere with state

regulation of the local electoral process. Although Congress has the power under the fourteenth and fifteenth amendments to pass statutes prohibiting conduct which does not rise to the level of a constitutional violation, it may not infringe any provision of the Constitution in doing so. Yet the Voting Rights Act, at least as applied to judicial elections, violates the principle of separation of powers underlying the United States and the Texas Constitution and the Equal Protection Clause of the fourteenth amendment in order to extend protections to protected minorities which are not themselves required by the Constitution.

5.5. The Equal Protection Clause of the fourteenth amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Voting Rights Act, as amended in 1982, is, however, expressly designed to force states to adopt measures as remedies for alleged vote dilution that favor protected classes over other classes and thus deprive members of nonprotected classes of the equal protection of the laws. Since Defendant Wood is

not a member of a class protected by the Act, that Act, used to force the restructuring of state judicial election districts in Harris County, Texas, would unconstitutionally deprive Defendant Wood of the equal protection of the laws.

5.6. Section 2 of the Voting Rights Act of 1965, as originally promulgated and enforced prior to 1982, did not expressly favor protected classes. The Act simply forbade any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color. In 1975, the Act was amended to extend its protections to members of language minority groups.³ In 1982 it was amended once again; and this time its protections were expressly limited to "members of a

³ As amended in 1975, the § 2 of the Voting Rights Act provided:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [i.e., guarantees protecting language minority groups].

protected class."⁴

5.7. Since the protections of § 2 of the Voting Rights Act as amended in 1982 are expressly extended to protected classes and not to others, the Voting Rights Act as amended is a race-based Act designed to further remedial goals. Therefore, its provisions are highly suspect and are to be

⁴ Section 2 of the Voting Rights Act, as amended in 1982, provides:

(a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of protected class elected in numbers equal to their proportion in the population.

treated by the courts with strict scrutiny so that they may determine whether its classifications are in fact motivated by racial politics, rather than by a more benign purpose, and whether those classifications carry the danger of leading to a politics of racial hostility.

5.8. Strict scrutiny reveals that the protections of § 2 of the Voting Rights Act, as amended, can be invoked in a vote dilution case, such as the present case, only by a protected minority which is geographically insular and politically cohesive and votes as a racial block against a white majority, which also votes as a racial block and usually manages to defeat candidates preferred by the protected minority. In that situation -- and in that situation only -- the Voting Rights Act comes alive to ensure that the protected class will be allowed to elect the representatives of its choice, even if that protected class is in the minority in the challenged election district, and even if the challenged district's boundaries have been drawn for compelling state reasons having nothing to do with race. However, the Voting Rights Act does not protect the rights of any class of

people other than those designated by the Act as protected classes -- even if the unprotected class finds itself in the precise circumstances which would invoke the Act if the class were protected, namely, in a situation where the unprotected class constitutes a minority of voters within a given election district -- a situation which, on information and belief, prevails in much of Southern Texas.

5.9. Defendant Wood makes no allegations concerning the constitutionality of the Voting Rights Act in regard to matters other than judicial elections. However, in regard to judicial elections, Section 2 as amended is a preferential Act which, in the name of preventing discrimination, is (a) actually a device for encouraging and rewarding racial politics and implicitly the notion of race-conscious justice by forcing states to adopt measures to remedy "vote dilution" (b) by ignoring the principle of "one-man, one-vote" to guarantee a disproportionately large number of minority judges committed to such race-conscious justice. Both concepts would deprive nonprotected classes of the equal protection of the law. That Act therefore fails to meet the

test of strict scrutiny and flagrantly violates the equal protection clause of the Constitution.

5.10. Second, the Voting Rights Act, when extended to judicial elections, obliterates the distinction between legislators -- who represent the people and are properly representatives of the voters' personal interests (such as the voters' desire to have the interests of their racial or language group put foremost) -- and judges -- who serve the interests of all the people impartially and in the proper exercise of whose function the desires of the voters to promote racial identification have no proper role at all. When the Voting Rights Act is applied to judges, the proper distinction between the legislative and judicial function is sacrificed to the promotion of racial interests and any state in which it is so used is denied the opportunity to maintain the separation of the legislative and judicial function which is fundamental to the United States Constitution itself and to all state constitutions, including the Texas Constitution.

WHEREFORE, Harris County District Judge Sharolyn Wood respectfully requests that the Houston Lawyers'

Association Plaintiffs' cause of action be dismissed with respect to the system for electing district judges within Harris County and that judgment be entered in her favor and that she recover all other relief, both general and special, in law and in equity, to which she may show herself justly entitled.

III.

DEFENDANT WOOD'S COUNTERCLAIM

Harris County District Judge Sharolyn Wood, Defendant in the above-captioned action, now acting as and designated Counter-Plaintiff, complains of the Plaintiffs, now designated Counter-Defendants, and for cause of action would show by way of counter-claim the following:

6.1. Counter-Plaintiff incorporates by reference the allegations in paragraphs 1.1 through 5.10 as though fully restated.

6.2. In connection with the controversy which is the subject of this cause of action, Counter-Defendants rely integrally on the constitutionality of the Voting Rights Act of 1965 as amended in 1982 and codified at 42 U.S.C.A. §

1973 (West Supp. 1988). Title 28 §§ 2201 and 2202 permit any interested party to seek a declaration of his rights and other legal relations in a case of actual controversy within its jurisdiction and to seek further necessary or proper relief based on a declaratory judgment. Therefore Counter-Plaintiff seeks a declaration of her rights vis-a-vis the amended Voting Rights Act under the United States Constitution.

6.3. For the reasons set forth above in paragraphs 4.1 through 4.2 and hereby incorporated by reference, Counter-Plaintiff alleges that state judicial elections are beyond the scope of the Voting Rights Act of 1965.

6.4. Alternatively, and still urging and relying upon the claim set forth herein, Counter-Plaintiff further alleges that, for the reasons set forth in paragraphs 5.1 through 5.10 and hereby incorporated by reference, the Voting Rights Act as amended in 1982 is unconstitutional as applied to judicial elections. It deprives non-protected classes of the equal protection of the law, in violation of the fourteenth amendment; and in addition, it deprives citizens of those

states in which it is invoked to force the redistricting of state judicial election districts of their right to a form of government in which the function of the judiciary as servants of the people is kept separate from the function of the legislature as representatives of the people. More specifically, its application in the way by Plaintiff's would deprive Defendant Wood of her constitutional rights.

6.5. In that she seeks a declaration of her constitutional rights, Defendant Wood is entitled to court costs and attorney's fees.

WHEREFORE, Counter-Plaintiff Wood respectfully prays that the Court will grant her relief as follows:

1. Declare that the Voting Rights Act of 1965, as amended in 1982, does not apply to judicial elections; or, alternatively,
2. Declare that the Voting Rights Act of 1965, as amended in 1982, is unconstitutional as applied to judicial elections; and
3. Dismiss all of Plaintiffs' claims; and
4. Award Counter-Plaintiff her just costs and

attorney's fees pursuant to 28 U.S.C. § 2202 and 42 U.S.C. § 1988; and

5. Award Counter-Plaintiff such other and further relief in law and in equity to which she may show herself to be justly entitled.

Respectfully submitted,

PORTER & CLEMENTS

[Caption]

PLAINTIFFS' SECOND AMENDED COMPLAINT

I. INTRODUCTION

1. The members of Plaintiffs LULAC, LULAC COUNCIL #4434 and LULAC COUNCIL #4451 and the named individual Plaintiffs are Mexican-American and Black citizens of the State of Texas. They bring this action pursuant to 42 U.S.C. 1971, 1973, 1983, 1988 to redress a denial, under color of state law, of rights, privileges or immunities secured to Plaintiffs by the said laws and by the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Plaintiffs seek a declaratory judgment that the existing at large scheme of electing district judges in the target areas of the State of Texas violates Plaintiffs' civil rights in that such method illegally and/or unconstitutionally dilutes the voting strength of Mexican-American and Black electors; Plaintiffs seek a permanent injunction prohibiting the calling, holding, supervising or certifying of any future elections for district judges under the present at large scheme

in the target areas; Plaintiffs seek the formation of a judicial districting scheme by which district judges in the target areas are elected from districts which include single member districts; Plaintiffs seek costs and attorneys' fees.

II. JURISDICTION

3. Jurisdiction is based upon 28 U.S.C. 1343 (3) & (4), upon causes of action arising from 42 U.S.C. 1971, 1973, 1983, & 1988, and under the Fourteenth and Fifteenth Amendments to the U.S. Constitution. Declaratory relief is authorized by 28 U.S.C. 2201 & 2202 and by Rule 57, F.R.C.P.

III. PLAINTIFFS

4. Plaintiff LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) is a statewide organization whose members are United States Citizens of Mexican American and black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in the various counties.

5. LULAC Council No. 4434 is a local organization whose membership is composed of United States Citizens

most of whom are of Mexican-American and Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Midland County. LULAC Council No. 4451 is a local organization whose membership is composed of United States Citizens most of whom are of Mexican-American or Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Ector County.

6. Plaintiff CHRISTINA MORENO is a United States Citizen of Mexican-American descent and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

7. Plaintiff AQUILLA WATSON is a Black United States Citizen and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

8. Plaintiff MATTHEW W. PLUMMER, Sr. is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Harris County.

9. Plaintiff JIM CONLEY is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Bexar County.

10. Plaintiff VOLMA OVERTON is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Travis County.

11. Plaintiff WILLARD PEN CONAT is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Fort Bend County.

12. Plaintiff GENE COLINS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Ector County.

13. Plaintiff AL PRICE is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Jefferson County.

14. Plaintiff THEODORE HOGROBROOKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in

Smith County.

15. Plaintiff ERNEST M. DECKARD is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Smith County.

16. Plaintiff MARY ELLEN HICKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; she is qualified to vote for district judges in Tarrant County.

16a. Plaintiff REV. JAMES THOMAS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Galveston County.

IV. PLAINTIFF INTERVENORS

17. Members of the HOUSTON LAWYERS' ASSOCIATION, ALICE BONNER, WELDON BERRY, FRANCIS WILLIAMS, REV. WILLIAM LAWSON, DELOYD T. PARKER, BENNIE McGINTY, JESSE OLIVER, FRED TINSLEY, JOAN WINN WHITE, and Members of THE BLACK LEGISLATIVE CAUCUS are

Black United States Citizens and are resident taxpayers of the State of Texas; they are qualified to vote for district judges in Texas.

V. DEFENDANTS

18. Defendant JIM MATTOX is the Attorney-General of the State of Texas, and is the chief law enforcement officer of the state and as such, is charged with the responsibility to enforce the laws of the state. Defendant JACK RAINS is the Secretary of State of the State of Texas, and is the chief elections officer of the state and as such, is charged with the responsibility of administering the election laws of the state. Defendants THOMAS R. PHILLIPS, JOHN F. ONION, RON CHAPMAN, THOMAS J. STOVALL, JAMES F. CLAWSON, JR., JOE E KELLY, JOE B. EVINS, SAM M. PAXSON, WELDON KIRK, CHARLES J. MURRAY, RAY D. ANDERSON, LEONARD DAVIS and JOE SPURLOCK, II are members of the JUDICIAL DISTRICTS BOARD created by Art. V. Sec. 7a of the Texas Constitution, and pursuant to Art. 24.941 et. seq. Texas Government Code. They have the

duty to reapportion judicial districts within the State of Texas.

VI. FACTUAL ALLEGATIONS

19. District judges are elected either from judicial districts which are coterminous with and wholly contained within a county, or from judicial districts which are composed of several entire counties.

20. In those counties which contain more than one judicial district, the present election system is an at large scheme with the equivalent of numbered places, the majority rule requirement, and staggered terms.

21. The following counties, which are being challenged in this lawsuit, elect the following number of district judges and, according to the 1980 U.S. Census, contain the following population:

<u>COUNTY</u>	<u># OF JUDGES</u>	<u>TOTAL</u>	<u>S.S.</u>	<u>BLK</u>	
	<u>ELECTED</u>	<u>POP.</u>	<u>POP. (%)</u>	<u>POP. (%)</u>	<u>CM. %*</u>
Harris	59	2,409,544	369,075(15.3)	473,698(19.7)	35.0
Dallas	36	1,556,549	154,560(9.9)	287,613(18.5)	28.4
Bexar	19	988,800	460,911(46.6)	69,201(7.0)	53.6

95a

Tarrant	23	860,880	67,632(7.9)	101,183(11.8)	19.7
Travis	13	419,335	72,271(17.2)	44,988(10.7)	27.9
Jefferson	8	250,938	10,279(4.1)	70,810(28.2)	32.3
Lubbock	5	211,651	41,428(19.6)	15,780 (7.5)	27.0
Galveston	5	195,940	23,557(12.0)	36,328(18.5)	30.6
McLennan	4	170,755	14,988(8.8)	27,254(16.0)	24.7
Fort Bend	3	130,846	26,656(20.4)	20,420(15.6)	36.0
Smith	4	128,366	4,037(3.1)	28,215(22.0)	25.1
Ector	4	115,374	24,831(21.5)	5,154 (4.5)	26.0
Midland	3	82,636	12,323(14.9)	7,119 (8.6)	23.5
El Paso, Hudspeth, and Culberson**	11	485,942	282,691(58.2)	18,162 (3.7)	61.9

* Combined Minority

** Eight district judges are elected at large within El Paso County; the other three are elected at large within the three county area of El Paso, Hudspeth, and Culberson Counties.

22. The following counties comprise a judicial area that elects three (3) judges at large: EL PASO, CULBERSON, and HUDSPETH. This area contains enough minorities that are sufficiently geographically concentrated that if single member districts were created, at least one of

those districts would be able to elect a minority.

23. The above areas elect 197 district judges. Each area contains enough minorities that are sufficiently geographically concentrated so that if single member districts were created, at least one of those districts in each area would be able to elect a minority.

24. Upon information and belief, in the above named areas minorities are politically cohesive.

25. Upon information and believe in the above cited areas, the white majority votes sufficiently as a block to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate.

26. Upon information and belief, in the above challenged areas, the at large election scheme interacts with social and historical conditions to cause an inequality in the opportunity of hispanic and/or black voters to elect representatives of their choice as compared to white voters.

27. Upon information and belief, the following are the names of the presently sitting judges' elected from the

above counties:

<u>COURT</u>	<u>JUDGE</u>	<u>COUNTY</u>	<u>VOTING RACE/ PRECINCT ETHNIC</u>
11th	Mark Davidson	Harris	224 W
55th	Reagan Cartwright	Harris	178 W
61st	Shearn Smith	Harris	** W
80th	William R. "Bill Powel	Harris	040 W
113th	Geraldine B. Tennant	Harris	227 W
125th	Don E. Wittig	Harris	118 W
127th	Sharolyn P. Wood	Harris	282 W
129th	Hugo A. Touchy	Harris	385 W
133rd	Lamar McCorkle	Harris	** W
151st	Alice Oliver Trevathan	Harris	441 W
152nd	Jack O'Neill	Harris	493 W
157th	Felix Salazar, Jr.	Harris	134 H
164th	Pete Solito	Harris	217 W
165th	Ken Harrison	Harris	413 W
174th	George H. Godwin	Harris	015 W
176th	James Brian Rains	Harris	116 W
177th	Miron A. Love	Harris	034 W
178th	William T. "Bill" Harmon	Harris	129 W
179th	J. Mike Wilkinson	Harris	456 W
180th	Patricia R. Lykos	Harris	626 W
182th	Donald K. Shipley	Harris	261 W
183th	Jay W. Burnett	Harris	567 W
184th	Robert N. Burdette	Harris	356 W
185th	Carl Walker, Jr.	Harris	138 B
189th	Richard W. Millard	Harris	056 W
190th	Wyatt H. Heard	Harris	227 W
208th	Thomas H. Routt	Harris	136 B
209th	Michael T. McSpadden	Harris	148 W
215th	Eugene Chambers	Harris	663 W
228th	Ted Poe	Harris	658 W

230th	Joe Kegans	Harris	222	W
232rd	A.D. Azios	Harris	178	H
234th	Ruby K. Sondock	Harris	434	W
245th	Henry G. Schuble	Harris	305	W
246th	John W. Peavy, Jr.	Harris	228	B
247th	Charles Dean			
	Huckabee	Harris	628	W
248th	Woody R. Densen	Harris	034	W
257th	Norman R. Lee	Harris	628	W
262nd	Doug Shaver	Harris	200	W
263rd	Charles J. Hearn	Harris	351	W
269th	W. David West	Harris	219	W
270th	Ann Tyrrell			
	Cochran	Harris	217	W
280th	Melinda Furche			
	Harmon	Harris	129	W
281st	Louis M. Moore	Harris	297	W
295th	Dan Downey	Harris	441	W
308th	Bob W. Robertson	Harris	430	W
309th	John D. Montgomery	Harris	518	W
310th	Allen J. Daggett	Harris	577	W
311th	Bill Elliott	Harris	221	W
312th	Robert S.			
	Webb, III	Harris	200	W
313th	Robert L. Lowery	Harris	371	W
314th	Robert R. Baum	Harris	296	W
315th	Eric G. Andell	Harris	183	W
333rd	Davie L. Wilson	Harris	466	W
334th	Russel T. Lloyd	Harris	316	W
337th	Jim Barr	Harris	432	W
338th	Mary Bacon	Harris	344	W
339th	Norman E. Lanford	Harris	050	W
351st	Lupe Salinas	Harris	115	H
14th	John M. Marshall	Dallas	1174	W
44th	Candace Tyson	Dallas	1203	W
68th	Gary B. Hall	Dallas	1123	W
95th	Joe B. Brown	Dallas	4418	W
101st	Joseph B. Morris	Dallas	1227	W
116th	Frank Andrews	Dallas	1129	W

134th	Anne A. Packer	Dallas	1176	W
160th	Mark Whittington	Dallas	4418	W
162nd	Catherine J. Crier	Dallas	2277	W
191st	David Brooks	Dallas	2242	W
192nd	Merrill L. Hartman	Dallas	2266	W
193rd	Michael J. O'Neill	Dallas	2260	W
194th	Harold Entz, Jr.	Dallas	1185	W
195th	Joe Kendall	Dallas	1171	W
203rd	Thomas B. Thorpe	Dallas	1103	W
204th	Richard D. Mays	Dallas	1148	W
254th	Dee Miller	Dallas	1176	W
255th	Don D. Koons	Dallas	1227	W
256th	Carolyn Wright	Dallas	3302	B
265th	Keith T. Dean	Dallas	1122	W
282nd	Tom Price	Dallas	1202	W
283rd	Jack Hampton	Dallas	2271	W
291st	Gerry Meier	Dallas	1209	W
292nd	Michael E. Keasler	Dallas	4406	W
298th	Adolph Canales	Dallas	1216	H
301st	Robert O'Donnell	Dallas	2203	W
302nd	Frances A. Harris	Dallas	2222	W
303rd	N. Sue Lykes	Dallas	4437	W
304th	Harold C. Gaither, Jr.	Dallas	4516	W
305th	Catherine J. Stayman	Dallas	2253	W
330th	Theo Bedard	Dallas	1185	W
Crim Dist.1	Ron Chapman	Dallas	2241	W
Crim Dist.2	Larry W. Baraka	Dallas	4453	B
Crim Dist.3	Mark Tolle	Dallas	1187	W
Crim Dist.4	Frances J. Maloney	Dallas	1145	W
Crim Dist.5	Pat McDowell	Dallas	1162	W
70th	Gene Ater	Ector	**	W
161st	Tryon D. Lewis	Ector	**	W
244th	Joseph Connally	Ector	**	W

100a

358th	Bill McCoy	Ector	**	W
19th	Bill Logue	McLennan	**	W
54th	George H. Allen	McLennan	**	W
74th	Derwood Johnson	McLennan	**	W
170th	Joe Johnson	McLennan	**	W
17th	Fred W. Davis	Tarrant	2052	W
48th	William L. Hughes, Jr.	Tarrant	2143	W
67th	George Allen Crowley	Tarrant	4095	W
96th	Jeff Walker	Tarrant	3101	W
141st	Dixon W. Holman	Tarrant	2266	W
153rd	Sidney C. Farrar, Jr.	Tarrant	4130	W
213rd	George S. Kredell	Tarrant	2352	W
231st	Maryellen W. Hicks	Tarrant	1104	B
233rd	William H. Brigham	Tarrant	3151	W
236th	Albert L. White, Jr.	Tarrant	1004	W
297th	Everett Young, Jr.	Tarrant	1004	W
322nd	Frank W. Sullivan, III	Tarrant	3151	W
323rd	Scott D. Moore	Tarrant	4343	W
324th	Brian A. Carper	Tarrant	2012	W
325th	Robert L. Wright	Tarrant	1081	W
342nd	Joe Bruce Cunningham	Tarrant	1081	W
348th	Michael D. Schattman	Tarrant	3151	W
352nd	Bruce Auld	Tarrant	3286	W
360th	V. Sue Koenig Stephenson	Tarrant	3289	W
Crim Dist.1	Louis E. Sturns	Tarrant	4203	B
Crim Dist.2	Lee Ann Dauphinot	Tarrant	1189	W
Crim Dist.3	Don Leonard	Tarrant	1004	W
Crim Dist.4	Joe Drago, III.	Tarrant	1022	W

101a

142nd	Pat M. Baskin	Midland	205	W
238th	Van Culp	Midland	307	W
318th	Dean Rucker	Midland	212	W
53rd	Mary Pearl			
	Williams	Travis	237	W
98th	Jeanne Mourer	Travis	207	W
126th	Joe Hart	Travis	320	W
147th	Mace B.			
	Thurman, Jr.	Travis	256	W
167th	Bob Jones	Travis	328	W
200th	Paul R. Davis Jr.	Travis	320	W
201st	Jerry Dellana	Travis	324	W
250th	Harley Clark	Travis	145	W

[Caption]

**STATE DEFENDANTS' ORIGINAL ANSWER TO
PLAINTIFFS' SECOND AMENDED COMPLAINT**

The State Defendants -- that is, the Attorney General of Texas, the Secretary of State of Texas and the thirteen members of the Judicial Districts Board of Texas, all in their official capacities -- answer as follows to the Plaintiffs' Second Amended Complaint ("the complaint"):

First Defense

The complaint fails to state a claim against State Defendants upon which relief can be granted because:

A. Each of the judicial districts challenged by the plaintiffs already is a single member district. State district judges are elected to a specific judicial district and serve as the judge for that district without sitting as part of a collegial decisionmaking body. Vote dilution claims cannot be made against a single member electoral system;

B. Alternatively, as to the challenge to the 72nd Judicial District and the 114th Judicial District, only one state district judge is elected from each of the geographical

units comprising them. The 72nd Judicial District is comprised of the counties of Crosby and Lubbock. The 114th Judicial District is comprised of the counties of Smith and Wood. Therefore, each of these two districts is a single member district. Vote dilution claims cannot be made against a single member electoral system;

C. Alternatively, as to the challenge to the following judicial districts, each already is a single member district because it is the only judicial district in the county for which an election is scheduled in the year indicated in brackets adjacent to the district: (i) 238th Judicial District in Midland County [1990]; (ii) 268th Judicial District in Fort Bend County [1992]; (iii) 34th Judicial District in Culberson, El Paso, and Hudspeth Counties (combined) [1992]; (iv) 7th Judicial District in Smith County [1992]; and (v) 161st Judicial District in Ector County [1992]. Vote dilution claims cannot be made against a single member electoral system;

D. Alternatively, as to the challenge to the following judicial districts, each already is a single member district

because it is the only judicial district in the county devoted to the general civil/non-specialized, criminal, or family docket, as indicated in brackets adjacent to the district: (i) 289th Judicial District in Bexar County [family]; (ii) 147th Judicial District in Travis County [criminal]; (iii) 327th Judicial District in El Paso County [family]; (iv) 306th Judicial District in Galveston County [family]; (v) 321st Judicial District in Smith County [family]; (vi) 205th Judicial District in county unit of Culberson, El Paso, and Hudspeth [criminal]; (vii) 328 Judicial District in Fort Bend County [family]; and (viii) 318th Judicial District in Midland County [family]. (It subsequently may be determined that other of the challenged districts also are the only courts of a specialized type within a geographical unit and that, therefore, they too must be added to the immediately foregoing list.) Vote dilution claims cannot be made against a single member electoral system;

E. Alternatively, as to the challenge to the following judicial districts, each already is a single member district because it is the only judicial district in the county devoted

to the general civil/non-specialized, criminal, or family docket, as indicated in brackets adjacent to the district, for which an election is scheduled in the year indicated in braces adjacent to the court specialization designation: (i) 303rd Judicial District in Dallas County [family] {1992}; (ii) 360th Judicial District in Tarrant County [family] {1992}; (iii) 289th Judicial District in Bexar County [family] {1990}; (iv) 147th Judicial District in Travis County [criminal] {1990}; (v) 327th Judicial District in El Paso County [family] {1990}; (vi) 306th Judicial District in Galveston County [family] {1990}; (vii) 321st Judicial District [family] {1990}; (viii) 241st Judicial District in Smith County [general civil/non-specialized] {1990}; (ix) 7th Judicial District in Smith County [general civil/non-specialized] {1992}; (x) 205th Judicial District in county unit of Culberson, El Paso, and Hudspeth [criminal] {1990}; (xi) 210th Judicial District in county unit of Culberson, El Paso, and Hudspeth [general civil/non-specialized] {1990}; (xii) 34th Judicial District in county unit of Culberson, El Paso, and Hudspeth [general civil/non-specialized] {1992}; (xiii) 328th Judicial District in

Fort Bend County [family] {1990}; (xiv) 240th Judicial District in Fort Bend County [general civil/non-specialized] {1990}; (xv) 268th Judicial District in Fort Bend County [general civil/non-specialized] {1992}; (xvi) 318th Judicial District in Midland County [family] {1992}; (xvii) 238th Judicial District in Midland County [general civil/non-specialized] {1990}; and (xviii) 142nd Judicial District in Midland County [general civil/non-specialized] {1992}. (It subsequently may be determined that other of the challenged districts also are the only courts of a specialized type within a geographical unit up for election in a given year and that, therefore, they too must be added to the foregoing list.) Vote dilution claims cannot be made against a single member electoral system.

Second Defense

1. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence of ¶1 of the complaint. The remainder of ¶1 of the complaint contains only averments to which no responsive pleading is required; however, to the

extent it is construed to contain averments requiring a responsive pleading, the State Defendants deny them.

2. ¶12 of the complaint contains only averments to which no responsive pleading is required; however, to the extent it is construed to contain averments requiring a responsive pleading, the State Defendants deny them.

3. To the extent that ¶13 of the complaint is construed to contain averments to which a responsive pleading is required, the State Defendants admit ¶13's averment that the Court has jurisdiction over this action, but deny that each of the cited provisions provides such jurisdiction.

4. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶14-17 of the complaint.

5. The State Defendants admit that the averments in the first two sentences of ¶18 accurately identify who hold the two official positions to which reference is made and are generally accurate in their description of the state law-based responsibilities concerning the administration and

enforcement of the laws of the state of Texas, including those concerning the electoral process. Because of uncertainty about the intended reach of some of the descriptions of the officials' duties in the first two sentences of ¶18, however, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of those averments beyond what is stated in the preceding portion of this paragraph. The State Defendants admit the averments in the third sentence of ¶18, except they deny that John F. Onion and Charles J. Murray are members of the Judicial Districts Board of Texas. They have been replaced by Michael J. McCormick and Roger J. Walker, respectively. The State Defendants deny the averments in the fourth sentence of ¶18 because the reapportionment duties are not exclusive and are dependent on other circumstances.

6. The State Defendants admit the averments in ¶19 of the complaint.

7. The State Defendants deny the averments in ¶20 of the complaint.

8. The State Defendants deny the averments in ¶21 of the complaint insofar as they state or imply that: counties are being challenged; they have listed all the counties within whose geographical boundaries lie challenged judicial districts; and the listing of the number of state district judges elected within a specific county's geographical boundaries indicates the number of at-large positions held by state district judges within that county's boundaries. At this point, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining averments in the paragraph, including averments concerning population data indicated by the 1980 United States Census. The 1980 United States Census data speaks for itself.

9. The State Defendants deny the averments in ¶¶22 and 23 of the complaint.

10. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶24-26 of the complaint.

11. The State Defendants admit, except for certain spelling or typographical errors, the averments in ¶27 of the

complaint concerning the listing of the challenged district courts and the names of the individuals currently holding those positions. The State Defendants admit the paragraph's averments about the geographical unit in which voters may cast their votes for those judicial district positions, except for the averments about the 72nd and 114th Judicial Districts. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶27 of the complaint about the voting precinct and the race or ethnicity of the individuals currently holding the district judgeships. However, attached as Exhibit A to this answer is a chart which assumes the accuracy of the plaintiffs' racial/ethnic classification of individuals currently holding office in the challenged judicial districts. Exhibit A uses this assumption, plus the specialization designations for the judicial districts in the Texas Government Code, plus the schedule of when those positions are up again for election as indicated in the 1988 Fiscal Year Report on the Texas Judicial System as prepared by the Texas Judicial Council/Office of Court Administration.

12. The State Defendants deny the averments in ¶¶28 and 29 of the complaint.

13. ¶30 of the complaint contains only legal averments to which no responsive pleading is required.

14. The State Defendants deny the averments in ¶¶31 and 32 of the complaint.

15. ¶33 of the complaint contains only legal averments to which no responsive pleading is required.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

[Caption]

***DALLAS COUNTY DISTRICT JUDGE F. HAROLD
ENTZ'S FIRST AMENDED ANSWER TO LULAC'S
SECOND AMENDED COMPLAINT***

TO THE HONORABLE JUDGE BUNTON:

The Honorable F. Harold Entz ("Judge Entz") files his First Amended Answer to LULAC's Second Amended Complaint as follows:

RESPONSE TO NUMBERED PARAGRAPHS

1. Judge Entz lacks knowledge and information sufficient to form a belief regarding the specific membership of LULAC, the various LULAC councils, and the named individual plaintiffs, but has no reason to doubt that they are Mexican-American and African-American citizens of the State of Texas. Judge Entz need not respond to the legal statement with respect to the purported statutory bases for the instant action, but specifically denies that any of the Dallas County Plaintiffs have been denied any of their rights, privileges, or immunities secured by the laws of the United States of America.

2. Judge Entz denies that the Dallas County

Plaintiffs are entitled to any of the relief sought.

3. Judge Entz does not contest jurisdiction at this time, but denies that any cause of action exists with respect to Dallas County.

4.-17. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations.

18. Judge Entz admits that the persons named hold the identified offices. The balance of the paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

19. Admitted as to Dallas County.

20. Denied because of the ambiguous terms used. Dallas County Judicial Districts are coterminous with county lines and Judges are elected by majority vote in differing years.

21.-22. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations.

23. Judge Entz denies that Mexican-Americans are sufficiently geographically compact in Dallas County to constitute a safe majority in any single member district if a single member districting plan was employed in Dallas

County. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in the paragraph.

24.-26. Denied with respect to Dallas County.

27. Admitted with respect to Dallas County.

28.-29. Denied with respect to Dallas County.

30. This paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

31.-32. Denied with respect to Dallas County.

33. Judge Entz denies that Plaintiffs are entitled to the relief sought with respect to Dallas County.

AFFIRMATIVE DEFENSES

34. For purposes of preserving appellate review, Judge Entz affirmatively claims that neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution apply to judicial selection.

35. The lack of electoral success, if any, of minority candidates for judicial office was not caused by the electoral practices that Plaintiffs challenge. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States

Constitution apply to electoral practices that do not cause the lack of electoral success, if any, of minority candidates.

36. Electoral success of judicial candidates in Dallas County depends on the partisan affiliation of the candidate, rather than the race of the candidate. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution ensure the right of minority voters to elect judicial candidates from the political party of their choice.

37. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution permit aggregating distinct minority groups to prove dilution.

38. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to judicial elections is unconstitutional because it violates the separation of powers doctrine, the 10th amendment of the United States Constitution, and fundamental principles of federalism.

39. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States

Constitution to alter electoral practices that did not cause the lack of electoral success, if any, of minority judicial candidates or the underrepresentation, if any, of minorities among successful judicial candidates would be unconstitutional under the equal protection and due process clauses of the United States Constitution.

40. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to require single member districts for judicial elections in Dallas County without adjusting Texas state law venue and jury selection provisions to provide coterminous districts for venue and jury selection purposes would violate the due process and equal protection clauses and the 6th and 7th amendments of the United States Constitution.

41. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to adjust Texas state law venue and jury selection provisions would violate the Guaranty Clause and 10th amendment of the United States Constitution, as well as fundamental principles of federalism.

42. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to Dallas County to require single member judicial districts, based on a showing that minorities are unable to elect non-minority candidates of the political party of the minorities preference, would unconstitutionally interfere in the political process by favoring the political party currently enjoying the support of the minority population, as opposed to removing any alleged remaining obstacles to the elections of minority candidates.

43. Minorities are overrepresented on the Dallas County State District Courts in proportion to the number of minorities in Dallas County eligible for such judicial offices.

44. Plaintiffs' claims should be dismissed for failure to join all district judges within the "target counties" and all appellate judges as defendants in that these judges are necessary or indispensable parties under Rule 19.

WHEREFORE, Dallas County District Judge F. Harold Entz respectfully requests that the Plaintiffs' claims be dismissed with respect to the system for electing district

judges within Dallas County and that judgment be entered in his favor and that he recover all other relief to which he may show himself justly entitled.

Respectfully submitted,

[Caption]

***DALLAS COUNTY DISTRICT JUDGE F. HAROLD
ENTZ'S ANSWER TO PLAINTIFF INTERVENORS
OLIVER, WHITE, AND TINSLEY***

TO THE HONORABLE JUDGE BUNTON:

The Honorable F. Harold Entz ("Judge Entz"), to the extent that Plaintiff Intervenors Oliver, White, and Tinsley have not abandoned their Complaint in Intervention by joining in LULAC's Second Amended Complaint, responds as follows:

RESPONSE TO NUMBERED PARAGRAPHS

1. Judge Entz admits that Jesse Oliver, Fred Tinsley, and Joan Winn White ("Intervenors") are former state district judges of Dallas County. He need not respond to the legal statement with respect to the purported statutory bases for the instant action, but specifically denies that Intervenors or any of the Dallas County Plaintiffs have been denied any of their rights, privileges, or immunities secured by the laws of the United States of America.

2. Judge Entz denies that Intervenors or any of the Dallas County Plaintiffs are entitled to any of the relief

sought with respect to Dallas County.

3. Judge Entz does not contest jurisdiction at this time, but denies that any cause of action exists with respect to Dallas County.

4. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations.

5. Judge Entz admits that the persons named hold the identified offices. The balance of the paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

6. Admitted as to Dallas County.

7. Denied because of the ambiguous terms used. Dallas County Judicial Districts are coterminous with county lines and Judges are elected by majority vote in differing years.

8.-17. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of these allegations, except that Judge Entz admits that Dallas County contains multiple judicial districts and denies that the Hispanic population in Dallas County is sufficiently compact to form a majority in any single member district that could be drawn.

18. Judge Entz denies that Mexican-Americans are sufficiently geographically compact in Dallas County to constitute a safe majority in any single member district if a single member districting plan was employed in Dallas County. Judge Entz lacks knowledge or information sufficient to form a belief as to the truth of the balance of the allegations in the paragraph.

19.-21. Denied with respect to Dallas County.

22. This paragraph calls for no responsive pleading.

23.-24. Denied with respect to Dallas County.

25. This paragraph alleges a legal conclusion that Judge Entz neither admits nor denies.

26.-27. Denied with respect to Dallas County.

28. Judge Entz denies that Intervenors or any of the Dallas County Plaintiffs are entitled to the relief sought with respect to Dallas County.

AFFIRMATIVE DEFENSES

29. For purposes of preserving appellate review, Judge Entz affirmatively claims that neither the Voting Rights Act nor the 14th and 15th amendments of the United

States Constitution apply to judicial selection.

30. The lack of electoral success, if any, of minority candidates for judicial office was not caused by the electoral practices that Plaintiffs challenge. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution apply to electoral practices that do not cause the lack of electoral success, if any, of minority candidates.

31. Electoral success of judicial candidates in Dallas County depends on the partisan affiliation of the candidate, rather than the race of the candidate. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution ensure the right of minority voters to elect judicial candidates from the political party of their choice.

32. Neither the Voting Rights Act nor the 14th and 15th amendments of the United States Constitution permit aggregating distinct minority groups to prove dilution.

33. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to judicial elections is unconstitutional because

it violates the separation of powers doctrine, the 10th amendment of the United States Constitution, and fundamental principles of federalism.

34. Application of either the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to alter electoral practices that did not cause the lack of electoral success, if any, of minority judicial candidates or the underrepresentation, if any, of minorities among successful judicial candidates would be unconstitutional under the equal protection and due process clauses of the United States Constitution.

35. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to require single member districts for judicial elections in Dallas County without adjusting Texas state law venue and jury selection provisions to provide coterminous districts for venue and jury selection purposes would violate the due process and equal protection clauses and the 6th and 7th amendments of the United States Constitution.

36. Application of the Voting Rights Act or the 14th

and 15th amendments of the United States Constitution to adjust Texas state law venue and jury selection provisions would violate the Guaranty Clause and 10th amendment of the United States Constitution, as well as fundamental principles of federalism.

37. Application of the Voting Rights Act or the 14th and 15th amendments of the United States Constitution to Dallas County to require single member judicial districts, based on a showing that minorities are unable to elect non-minority candidates of the political party of the minorities preference, would unconstitutionally interfere in the political process by favoring the political party currently enjoying the support of the minority population, as opposed to removing any alleged remaining obstacles to the elections of minority candidates.

38. Minorities are overrepresented on the Dallas County State District Courts in proportion to the number of minorities in Dallas County eligible for such judicial offices.

39. Plaintiffs' claims should be dismissed for failure to join all district judges within the "target counties" and all

appellate judges as defendants in that these judges are necessary or indispensable parties under Rule 19.

WHEREFORE, Dallas County District Judge F. Harold Entz respectfully requests that Intervenor and the Dallas County Plaintiffs' claims be dismissed with respect to the system for electing district judges within Dallas County and that judgment be entered in his favor and that he recover all other relief to which he may show himself justly entitled.

Respectfully submitted,

[Caption]

**STATE DEFENDANTS' ANSWER TO COMPLAINT
IN INTERVENTION BY HOUSTON
LAWYERS' ASSOCIATION, ET AL.**

The State Defendants -- that is, the Attorney General of Texas, the Secretary of State of Texas, and the thirteen members of the Judicial Districts Board of Texas, all in their official capacities -- answer as follows to the Complaint in Intervention ("complaint") of the Houston Lawyers' Association, Alice Bonner, Weldon, Berry, Francis Williams, Rev. William Lawson, Deloyd T. Parker, and Bennie McGinty.

First Defense

The complaint fails to state a claim against State Defendants upon which relief can be granted because each of the judicial districts challenged in Harris County already is a single member district. State district judges are elected to a specific judicial district and serve as the judge for that district without sitting as part of a collegial decisionmaking body. Vote dilution claims cannot be made against a single member electoral system.

Second Defense

1. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the first sentence of ¶1 of the complaint. The remainder of ¶1 of the complaint contains only averments to which no responsive pleading is required; however, to the extent it is construed to contain averments requiring a responsive pleading, the State Defendants deny them.

2. ¶¶2 and 3 of the complaint contain only averments to which no responsive pleading is required; however, to the extent they are construed to contain averments requiring a responsive pleading, the State Defendants deny them.

3. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of averments in ¶¶ 4-10 of the complaint.

4. The State Defendants admit that the averments in ¶¶11--13 of the complaint accurately identify the holders of the official positions to which reference is made and are generally accurate in their descriptions of the state law-based

responsibilities concerning the administration and enforcement of the laws of the state of Texas, including those concerning the electoral process. Because of uncertainty about the intended reach of some of the descriptions of the officials' duties in ¶¶11-13, however, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of those averments beyond what is stated in the preceding portion of this paragraph.

5. The State Defendants deny the averments in the first three sentences of ¶14 of the complaint and admit the averments in the fourth sentence of that paragraph. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the last sentence of ¶14 of the complaint.

6. The State Defendants deny the averments in ¶15 of the complaint, among other things, because of uncertainty as to the full meaning of "history."

7. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the

averments in ¶16-18 of the complaint.

8. The State Defendants admit the averments in ¶19 of the complaint.

9. The State Defendants deny the averments in ¶¶20-22 of the complaint.

10. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶23-24 of the complaint.

11. The State Defendants deny the averments in ¶25 of the complaint.

12. Except for the averments in the second sentence of ¶27, which they admit, the State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶¶26-29 of the complaint.

13. The State Defendants admit the averments in the first sentence of ¶30 of the complaint and deny the averments in the remainder of that paragraph.

14. The State Defendants deny the averments in ¶¶31-32 of the complaint, in part because of uncertainty as to the intended reach of some of the allegations.

15. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶33 of the complaint.

16. The State Defendants deny the averments in ¶¶34-35 of the complaint.

17. The State Defendants incorporate by reference their Answer to the paragraphs 11-29 of Plaintiffs' First Amended Complaint as their response to ¶36 of the complaint.

18. The State Defendants admit the averments in ¶37 of the complaint.

19. The State Defendants admit that the averments in ¶38 of the complaint are generally correct, but note that the first sentence of the current version of the referenced constitutional provision states that the "State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution."

20. The State Defendants deny the averments in ¶¶39-40 of the complaint.

21. The State Defendants are without knowledge or

information sufficient to form a belief as to the truth of the averments in ¶41 of the complaint.

22. The State Defendants deny the averments in ¶42 of the complaint.

23. The State Defendants admit the averments in ¶43 of the complaint.

24. The State Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in ¶44 of the complaint.

25. The State Defendants deny the averments in ¶¶45-48 of the complaint.

26. The remainder of the complaint contains only legal averments to which no responsive pleading is required.

TRIAL EXHIBIT NO. 1 OF JUDGE SHAROLYN WOOD

HARRIS COUNTY MINORITY CANDIDATE
CONTESTED JUDICIAL RACES:

GENERAL ELECTIONS

<u>Court</u>		<u>Candidates</u>	<u>Vote</u>	<u>GOP %</u>
	- - - - -	- 1980 - - - - -	- - - - -	- - - - -
Court of Civil Appeals	(W)	(R)* <u>Conway</u>	298,274	50.9
	(B)	(D) Doyle	288,197	
80th District Court	(W)	(R) <u>McAfee</u>	306,767	51.4
	(B)	(D)* <u>Bonner</u>	290,458	
309th District Court	(W)	(R) <u>Zimmerman</u>	309,810	51.6
	(H)	(D)* <u>Hinojosa</u>	290,870	
County Criminal Court	(W)	(R) <u>Musselwhite</u>	307,931	53.3
	(B)	(D)* <u>Muldrow</u>	269,420	

• = Incumbent
Winner is underlined

42 Races

- 26 White Winners
- 11 Hispanic Winners
- 5 Black Winners

<u>Court</u>	<u>Candidates</u>		<u>Vote</u>	<u>GOP %</u>
	- - - - -	- 1982 - - - - -	- - - - -	- - - - -
157th District Court	(W)	(R) Powell	185,030	46.0
	(H)	(D)* <u>Salazar</u>	217,234	
208th District Court	(W)	(R) Arnold	191,659	48.7
	(B)	(D)* <u>Routt</u>	201,838	
262nd District Court	(W)	(R) <u>Shaver</u>	199,671	51.1
	(B)	(D)* James	190,716	
281st District Court	(H)	(R) <u>Moore</u>	201,623	51.9
	(B)	(D)* <u>Ward</u>	187,093	
308th District Court	(H)	(R) Leal	190,985	48.7
		(D) <u>Robertston</u>	201,465	
County Criminal Court 6	(W)	(R) <u>Musselwhite</u>	198,221	50.9
	(B)	(D)* <u>Muldrow</u>	191,136	
County Criminal Court 9	(W)	(R) Kolenda	172,467	44.8
	(H)	(D)* <u>Leal</u>	212,091	

<u>Court</u>		<u>Candidates</u>	<u>Vote</u>	<u>GOP %</u>
	- - - - -	- 1980 - - - - -	- - - - -	- - - - -
Court of Appeals No. 1, Place 2	(W)	(D) O'Connor	365,280	
	(B)	(R)* Hoyt	414,462	53.2
80th District Court	(B)	(D)* Berry	347,336	
	(W)	(R) Powell	416,438	54.5
178th District Court	(B)	(D)* Jackson	324,025	
	(W)	(R) Harmon	429,858	57.0
215th District Court	(B)	(D)* Lee	363,686	
	(W)	(R) Chambers	401,026	52.4
339th District Court	(H)	(D)* Salinas	359,482	
	(W)	(R) Lanford	400,734	52.7
	- - - - -	- 1986 - - - - -	- - - - -	- - - - -
Texas Supreme Court, Place 4	(H)	(D)* Gonzales	241,196	
	(W)	(R) Bates	208,211	46.3
157th Civil District Court	(H)	(D)* Salazar	243,146	
	(W)	(R) Wittig	200,169	45.2

<u>Court</u>	<u>Candidates</u>	<u>Vote</u>	<u>GOP %</u>
180th Criminal District Court	(H) (D)* <u>Guerrero</u> (W) (R) <u>Lykos</u>	211,905 230,825	52.1
185th Criminal District Court	(B) (D)* <u>Walker</u> (W) (R) <u>Godwin</u>	218,637 209,663	49.0
209th Criminal District Court	(H) (D)* <u>Sanchez</u> (W) (R) <u>McSpadden</u>	192,359 250,808	56.6
232nd Criminal District Court	(H) (D)* <u>Azios</u> (W) (R) <u>Youngblood</u>	234,271 203,799	46.5
245th Civil District Court	(W) (D) <u>Schuble</u> (B) (R)* <u>Proctor</u>	241,414 191,477	44.2
281st Civil District Court	(B) (D)* <u>Berry</u> (H) (R) <u>Moore</u>	202,886 229,288	53.1
308th Family District Court	(W) (D) <u>Robertson</u> (H) (R)* <u>Dodier</u>	236,044 183,755	43.8
County Civil Court 3	(B) (D)* <u>Hobson</u> (W) (R) <u>Hughes</u>	217,363 211,650	49.3
County Criminal Court 3	(W) (D) <u>Duncan</u> (B) (R)* <u>Irvin</u>	238,376 199,867	45.6

<u>Court</u>		<u>Candidates</u>	<u>Vote</u>	<u>GOP %</u>
County Criminal Court 9	(H) (W)	(D)* <u>Leal</u> (R) <u>Powell</u>	226,455 199,667	46.9
County Criminal Court 11	(H) (W)	(D)* <u>Mendoza</u> (R) <u>Pickren</u>	221,631 206,094	48.2
County Criminal Court 13	(B) (W)	(D)* <u>Fitch</u> (R) <u>Atkinson</u>	211,713 213,268	50.2
County Criminal Court 14	(B) (W)	(D)* <u>Fisher</u> (R) <u>Barclay</u>	201,922 216,467	51.7
County Probate Court 4	(B) (W)	(D)* <u>Lee</u> (R) <u>McCullough</u>	212,710 223,894	51.3
----- 1988 -----				
Supreme Court, Place 3	(H) (W) (W)	(D)* <u>Gonzales</u> (R) <u>Howell</u> (L) <u>Scholz</u>	407,451 309,486 13,262	55.9 43.38 1.81
1st Court of Appeals District, Place 6	(H) (W)	(D)* <u>Mirabal</u> (R) <u>Stephanow</u>	385,692 327,365	54.09 45.91

<u>Court</u>		<u>Candidates</u>	<u>Vote</u>	<u>GOP %</u>
80th District Court	(B)	(D)* <u>Berry</u>	307,612	43.32
	(W)	(R) <u>Powell</u>	402,426	56.68
133rd District Court	(B)	(D)* <u>Plummer</u>	313,880	44.67
	(W)	(R) <u>McCorkle</u>	388,804	55.33
152nd District Court	(B)	(D) <u>Fitch</u>	329,325	46.53
	(W)	(R)* <u>O'Neill</u>	378,353	53.47
179th District Court	(H)	(D) <u>Guerrero</u>	347,287	49.36
	(W)	(R) <u>Wilkinson</u>	356,335	50.64
215th District Court	(B)	(D) <u>Jackson</u>	307,147	44.04
	(W)	(R) <u>Chambers</u>	390,290	55.96
295th District Court	(B)	(D) <u>Lee</u>	344,835	48.5
	(W)	(R)* <u>Downey</u>	366,130	51.5
333rd District Court	(B)	(D) <u>Spencer</u>	335,960	47.73
	(W)	(R) <u>Wilson</u>	367,927	52.27
351st District Court	(H)	(D) <u>Salinas</u>	363,444	51.76
	(W)	(R) <u>Pruett</u>	338,769	48.25

TRIAL EXHIBIT NO. 2 OF JUDGE SHAROLYN WOOD

HARRIS COUNTY MINORITY CANDIDATE
JUDICIAL RACES:

DEMOCRATIC PRIMARY ELECTIONS

Position	Name	Vote	%
157th Judicial District	(H) <u>Salazar</u>	40,821	100
208th Judicial District	(B) <u>Routt</u>	40,854	100
246th Judicial District	(B) <u>Peavy</u>	42,881	100
County Criminal Court #2	(W) <u>Hendrix</u>	27,426	52.97
	(H) <u>Barrera</u>	24,346	47.03
County Criminal Court #6	(B) <u>Muldrow</u>	36,976	100

Winner is underlined

39 Races:

- 20 Black Winners
- 13 Hispanic Winners
- 6 White Winners

<u>Position</u>	<u>Name</u>	<u>Vote</u>	<u>%</u>
	1984		
Court of Appeals, District 1			
Place 2			
	(B) Mims	18,373	18.92
	(W) <u>Briscoe</u>	36,363	37.73
	(W) <u>Price</u>	19,513	20.10
	(W) O'Conner	22,573	23.25
80th Judicial District	(B) <u>Berry</u>	71,624	100
178th Judicial District	(W) Dietz	5,236	5.91
	(H) <u>Castillo</u>	28,018	31.62
	(W) <u>O'Brien</u>	17,374	19.61
	(W) Parrott	10,326	11.65
	(W) <u>Stripling</u>	4,222	4.77
	(B) Jackson	23,448	26.46
215th Judicial District	(W) Brannon	15,282	15.93
	(B) <u>Lee</u>	57,278	59.68
	(W) <u>Price</u>	23,413	24.39
333rd Judicial District	(W) Gilbert	21,293	24.92
	(W) Levi	14,462	16.93
	(W) <u>Walters</u>	26,938	31.53
	(H) Sanchez	22,749	26.62

<u>Position</u>	<u>Name</u>	<u>Vote</u>	<u>%</u>
339th Judicial District	(B) <u>White</u>	30,673	34.82
	(H) <u>Salinas</u>	43,251	48.96
	(B) <u>James</u>	14,414	16.32
351st Judicial District	(W) <u>Burnett</u>	51,143	64.83
	(B) <u>Muldrow</u>	27,748	35.17
County Civil Court at Law No. 3 (Unexpired)	(H) <u>Chow</u>	25,377	29.02
	(B) <u>Hobson</u>	32,868	37.58
	(W) <u>Drake</u>	21,946	25.10
	<u>Amaimo</u>	7,261	8.30
- - - - - 1986 - - - - -			
Supreme Court, Place 4 (Unexpired)	(H) <u>Gonzalez</u>	29,334	57.27
	(W) <u>Humphreys</u>	8,196	16.00
	(W) <u>Gibson</u>	9,791	19.11
	(W) <u>Ivy</u>	3,902	7.62
157th Judicial District	(H) <u>Salazar</u>	40,568	100

<u>Position</u>	<u>Name</u>	<u>Vote</u>	<u>%</u>
180th Judicial District	(H) <u>Guerrero</u>	20,765	43.79
	(W) <u>Kobobel</u>	8,725	18.40
	(W) <u>Lanier</u>	17,927	37.81
185th Judicial District	(B) <u>Walker</u>	29,011	49.61
	(H) <u>Salinas</u>	23,412	40.04
	(W) <u>Peterson</u>	6,052	10.35
208th Judicial District	(B) <u>Routt</u>	39,116	100
209th Judicial District	(H) <u>Sanchez</u>	38,209	100
232nd Judicial District	(H) <u>Azios</u>	39,995	100
246th Judicial District	(B) <u>Peavy</u>	42,097	100
281st Judicial District	(B) <u>Berry</u>	39,416	100
295th Judicial District	(B) <u>Jackson</u>	24,650	48.15
	(W) <u>White</u>	26,539	51.85
County Court at Law No. 3	(B) <u>Hobson</u>	36,246	100
County Criminal Court No. 4	(B) <u>Williams</u>	39,730	100
County Criminal Court No. 9	(H) <u>Leal</u>	37,508	100

Position

County Criminal Court No. 11

<u>Name</u>	<u>Vote</u>	<u>%</u>
(W) Craggs	9,073	18.97
(H) <u>Mendoza</u>	17,062	35.67
(W) Bynum	5,342	11.17
(W) Reynolds	9,109	19.05
(W) Bostick	7,241	15.14

County Criminal Court No. 13

100

County Criminal Court No. 14

(B) Fitch	37,300	100
(B) Fisher	25,125	50.86
(H) <u>Fraga</u>	24,280	49.14

County Probate Court No. 4

(W) Smith	19,478	34.68
(B) <u>Lee</u>	36,689	65.32

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- - - - - 1988 - - - - -

Supreme Court, Place 3

(H) Vega	55,100	45.93
(H) <u>Gonzalez</u>	64,855	54.07

1st Court of Appeals District,
Place 5

(W) <u>Levy</u>	60,505	52.47
(H) Mirabal	54,805	47.53

80th Judicial District

(B) <u>Berry</u>	90,418	100
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<u>Position</u>	<u>Name</u>	<u>Vote</u>	<u>%</u>
133rd Judicial District	(B) <u>Plummer</u>	91,505	100
152nd Judicial District	(B) <u>Fitch</u>	88,890	100
179th Judicial District	(H) <u>Guerrero</u>	55,616	48.09
	(W) <u>Robertson</u>	45,825	39.62
	(W) <u>Tise</u>	14,212	12.29
215th Judicial District	(B) <u>Jackson</u>	61,586	62.60
	(W) <u>Smith</u>	36,803	37.41
333rd Judicial District	(B) <u>Spencer</u>	63,676	59.55
	(W) <u>Wooten</u>	43,248	40.45
351st Judicial District	(H) <u>Salinas</u>	87,874	100

[Caption]

**MOTION OF JUDGES TOM RICKHOFF, SUSAN D. REED,
JOHN J. SPECIA, JR., SID L. HARLE, SHARON
MACRAE, AND MICHAEL P. PEDEN TO INTERVENE
AS DEFENDANTS**

TO THE HONORABLE JUDGE OF SAID COURT:

Judges Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon MacRae, and Michael P. Peden move for permission to intervene in this action as party defendants pursuant to Rule 24(a) and (b) of the Federal Rules of Civil Procedure and attach as Exhibit A to this Motion their original Intervention (as Defendants) for the following reasons:

***INTERVENTION OF RIGHT PURSUANT TO RULE 24(a)
OF THE FEDERAL RULES OF CIVIL PROCEDURE***

1. Rule 24(a)(2) allows intervention as of right by intervenors who: (1) are timely; (2) have an interest relating to the subject of the action; (3) are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect that interest; and (4) are inadequately represented by existing parties. Rule 24(b) grants the court discretion to allow intervention by

intervenors whose claims or defenses have a question of law of fact in common with the main action and whose intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

2. Judges Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon MacRae, and Michael P. Peden (the "Bexar County District Judge Intervenors") are presently State Court District Judges (in the 289th, 144th, 225th, 226th, 290th, and 285th District Courts) in Bexar County, Texas. Bexar County is one of the counties in Texas made the subject of the claims by Plaintiff and Plaintiff-Intervenors in this action. All of the Bexar County Judge Intervenors are incumbents, and all have filed for re-election or announced their intent to file for re-election in the upcoming judicial elections.

3. The Bexar County District Judge Intervenors have interests relating to the transaction which is the subject of this action, the Court's Memorandum and Order of November 8, 1989, as they affect Bexar County and in the joint proposed interim plan between the Attorney General of

the State of Texas and the Plaintiffs. Other judges from Dallas and Harris County, Texas, already have intervened in this action as Defendants, and the Court already has recognized the propriety of such intervention of those judges.

4. The Bexar County District Judge Intervenors are situated so that the Court's disposition of this action will impair and impede substantially their ability to protect their interests, and the interests of the Bexar County District Judge Intervenors certainly are not represented adequately by any existing party in this action. In fact, the Attorney General of Texas, counsel for the State Defendants, has joined with Plaintiffs in submitting to the Court a joint Proposed Interim Plan that is contrary to these Intervenor's interests.

5. These Intervenor's are also similarly situated with and form part of the nexus between the remainder of the Bexar County District Judges, and the other district judges of the Fourth Judicial Administrative District, who will be impacted by the scope of any proposed interim plan or judgment so that the entire group of judges affected by any proposed interim plan and judgment will be similarly

and simultaneously affected.

6. These Intervenor's, as well as the other judges mentioned in paragraph 4 above, are uniquely situated as a group to decide proper court administration and determine the rights of litigants.

7. The joint proposed plan is entirely inconsistent with and prejudicial to the interests of the Bexar County Judge Intervenors, are contrary to the express wishes and specific instructions of the Attorney General's clients and contrary to the Texas Constitution. The Attorney General's unauthorized impermissible actions have been widely criticized by his clients, including the Governor of the State of Texas, the Chief Justice of the Supreme Court of Texas, and Associate Justice of the Supreme Court of Texas, and numerous State District judges who are directly affected. An obvious conflict of interest exists and the court should not approve the proposed interim plan of the Attorney General under such circumstances.

8. This case has great and serious implications for all Texans and the entire judicial system in Texas, will

require submission to the voters of amendments to the Texas Constitution, will require the Texas Legislature to act, and should not proceed in any manner until Defendants can secure counsel who will in fact represent Defendants fully and properly.

9. This Honorable Court on November 8, 1989, after extensive consideration, entered its Memorandum Opinion and Order (the "Order") in which the Court made certain explicit comments that are pertinent here. The Court expressed the following comments:

- a. Legislation should be done by legislators (Order, p. 4);
- b. The Texas Constitution will need to be amended (Order, p. 4); and
- c. Single member districts may or may not be the answer if we are to continue to have partisan elections (Order, p. 6).

Should the Legislature fail to adopt a satisfactory remedy in the Special Session . . . this Court will consider the granting of an expedited appeal to the Fifth Circuit to

determine whether or not the Declaratory Judgment of this Court [the "Order"] was properly made. (Order, p. 94).

10. In this proceeding, the Intervenors have been represented by the Attorney General of the State of Texas, who, following the Court's Order of November 8, 1989, has decided, without proper authority, to submit an interim plan to this Court to govern judicial elections of Intervenors, and others similarly situated, for the 1990 election.

11. In so proposing, the Attorney General's proposed plan violates the Texas Constitution, Article 5, § 7 (Vernon Supp. 1989) which allows Intervenors to serve a term of four (4) years because the proposed plan allows Intervenors to serve only two (2) years if elected in 1990. This Court did not find Article 5, § 7 to be unconstitutional in any manner, nor does the Attorney General have the authority to require a two (2) year term.

12. Furthermore, the Judicial Districts Board is created by the Texas Constitution, Article V, Section 7-A, which among other powers, is empowered to internally administer judicial assignments within the affected districts.

The Court's opinion did not hold the Board's authority to administer internal affairs to be unconstitutional.

13. Without regard to these constitutional limitations, the Attorney General's proposed interim plan constitutes a settlement which:

- a. Clearly does not take into account all necessary factors of the class of judges affected.
- b. Is a clear effort to preclude an appeal of right by affected class members, and
- c. Would create turmoil and confusion as to the internal administration of trial dockets which could substantially impair the rights of litigants in civil cases, the rights of defendants in criminal cases, and the ability to fairly assign judges for the trial of cases.

14. It is unwarranted to deny these Intervenor's a right to intervene because they will be left without representation as to the proposed plans before the Court and will be denied the right to appeal clearly warranted by the Court's Order.

15. Because of the lack of adequate representation, any action by this court would not be binding upon Intervenorors and no action should be taken by the Court until this issue is fully resolved. It is settled law that where there is not adequate representation, parties are not bound by any judgment. A case of this nature, extent, importance, and complexity, with its broad effects, should not proceed without the Defendants having proper representation. Intervenorors' interests as well as the interest of other judges and the people of Texas cannot be validly and determined with finality under the present circumstances.

16. Because of the crucial importance of this matter, the great expense which will be involved in any relief (interim or otherwise) that this Court determines, the cloud cast on this case and the conduct of the Attorney General should not be permitted to continue as to these Intervenorors who are directly affected as are other District Judges, have no adequate representation, and thus any judgment entered will not be binding on them or others similarly situated.

17. The Bexar County District Judge Intervenorors,

therefore, are entitled to intervene in this action as a matter of right under Rule 24(a), and request that the Court permit their intervention in this action only for the purposes being afforded an opportunity to be heard and a right to participate in the claims made regarding Bexar County and any proposed relief, either interim or permanent, affecting election of judges in Bexar County.

*PERMISSIVE INTERVENTION PURSUANT TO RULE 24(b)
OF THE FEDERAL RULES OF CIVIL PROCEDURE*

18. The Bexar County District Judge Intervenors request as an alternative to their claim to intervention as a matter of right under Rule 24(a) that the Court grant them permissive intervention under Rule 24(b).

19. The Bexar County District Judge Intervenors are substantially prejudiced by the claims of Plaintiffs, and have defenses with issues of law and fact which are both common to those of the State Defendants and have additional defense.

20. As in their claim to intervention as a matter of right, the Bexar County District Judge Intervenors request that the Court allow them to intervene under Rule 24(b) only

for the purposes of being afforded an opportunity to be heard and a right to participate in the claims asserted in this action about Bexar County and any relief, either interim or permanent, affecting the election of State Court Judges in Bexar County.

21. Intervention in this action by the Bexar County District Judge Intervenors will not unduly delay or prejudice the rights of the original parties. Their Motion is timely filed because no final judgment has been entered by the Court and its filing is contemporaneous with our understanding of the Court's deadline for consideration of plans.

REQUESTS FOR RELIEF

21. Accordingly, the Bexar County District Judge Intervenors request that the Court grant their Motion to Intervene under Rule 24(a) for the limited purposes of defending their interests against Plaintiffs' claims for relief in Bexar County, Texas, and any relief affecting the election of judges in Bexar County.

22. The Bexar County District Judge Intervenors

request alternatively that the Court grant their Motion to Intervene under Rule 24(b) for the limited purposes of defending their interests against Plaintiffs' claims for relief in Bexar County, Texas, and any relief affecting the election of judges in Bexar County.

23. The Bexar County District Judge Intervenors request that if the Court grants this Motion under either Rule 24(a) or 24(b) the Court consider as filed for all purposes in this action the signed, original Intervention of Judges Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon MacRae, and Michael P. Peden as Defendants attached to this Motion as Exhibit A.

Respectfully submitted,

[Caption]

**STATE DEFENDANTS' RESPONSE TO MOTION
TO INTERVENE BY JUDGES RICKHOFF, REED,
SPECIA, HARLE, MACRAE, AND PEDEN**

The State Defendants reply as follows to the motion to intervene filed by six state district judges sitting in Bexar County ("Bexar County judge-intervenors"):

Without conceding the validity of the assertions made in the intervention motion and supporting documents, the State Defendants do not oppose the motion insofar as the Bexar County judge-intervenors seek to intervene in their individual, or personal, capacities. In its rulings concerning the attempted intervention of thirteen Travis County judges, this Court has held that personal capacity intervention by sitting judges may be appropriate whereas official capacity intervention is not. In an appeal arising out of this case, the Fifth Circuit has agreed, by holding that sitting district judges have no legally cognizable interest in this case in their official capacity. See *LULAC v. Clements*, 884 F.2d 185, 188 (5th Cir. 1989).

Respectfully submitted,

FILED JAN 2, 1990

O R D E R

BEFORE THIS COURT are the parties with their respective Proposed Interim Plans, Motions to Certify this Court's Memorandum Opinion and Order, of November 8, 1989, for Interlocutory Appeal, and Motion of Bexar County District Judges to Intervene in the above captioned cause.

This case is reminiscent of several lines of a recent song, I'm for Love, by Hank Williams, Jr. The lyric goes,

"The City is against the county,
The county is against the state,
The state is against the government, and
the highway still ain't paved."

In this case the Governor has been against the Attorney General, the Attorney General against the Legislature, the Judges against this Court, and the system is still flawed. This is a regrettable situation, but it can't be helped. The Hank Williams song goes on to say "But I'm for love, and I'm for happiness."

This case was filed on July 11, 1988 and originally set for trial on February 13, 1989. The Court was persuaded,

at least on one occasion, to continue the trial to give the Texas Legislature a chance to address the issue during its Regular Session. This Court continued the above captioned cause to April 17, 1989 to await the United States Supreme Court's disposition of the Petition for Writ of Certiorari in the case of *Roemer v. Chisom*. The Court again continued the case to July 11, 1989, based on oral Motions to Continue made on the record during a hearing on Motions to Intervene held by this Court on February 27, 1989. The Court continued the trial to September 18, 1989, because of a conflict of settings with one of the attorneys. At the conclusion of the trial in September, the Court was requested to hand down its opinion prior to the convening of the Texas Legislature in Special Session so that a violation (if one was indeed found) could be looked at and perhaps remedied during the Special Session.

This Court specifically reserved ruling upon Plaintiffs' Motion for an Order enjoining further use of the at-large election scheme in the affected counties until the State Legislature had an opportunity to offer a remedial plan. The

Legislature went into Special Session on November 13, 1989, some five days after entry of this Court's November 8, 1989 Order. Governor Clements deemed it advisable not to submit the question of judicial redistricting to the Special Session. The governor did, however, request that he and this Court meet and discuss the matter. The meeting was held, and attorneys for both Plaintiffs and Defendants were present. The Governor advised the Court that no remedy would be forthcoming until some time after the March 13, 1990 Primary Elections. The Governor requested that the matter be delayed until the Regular Session of the Legislature in January, 1991. He further advised the Court that, if this was not satisfactory, he would call a Special Session some time in April or May of 1990 and request the Legislature to study and take whatever action might be necessary to remedy the situation.

The timing is perhaps unfortunate. There will be a census taken in 1990, which may reflect some changes in population in the nine counties involved. Our Legislature meets in Regular Session only in odd years and inevitably

somewhere down the line the method of selection or election of State District Judges will have to be submitted to the voters of Texas. The Court is of the opinion that a delay until after the Primary Elections are held in 1990 and a delay until after a Special Session of the Legislature is held in late spring of 1990 and a further delay of implementation of any solution by the Legislature would not be in the interest of justice, would further dilute the rights of minority voters in the target counties in question, and would be inequitable and work an even greater hardship on the judges and courts involved.

Because the Legislature took no action on the matter in Special Session in November and December, 1989, and the refusal of the Supreme Court to grant a writ in *Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988), and the statements of the Governor of the State of Texas, and the imminence of the Primary Elections in 1990, the Court is not inclined to defer action. See *Wise v. Lipscomb*, 437 U.S. 535 (1978). Under these circumstances, this Court is of the opinion that it may fashion an *interim plan* that the

law, equity and justice require. *Chisom, supra*, at 1192. On December 12, 1989, or shortly thereafter, all parties were advised to file any Proposed Plans and Objections with the Court by December 22, 1989. An Agreed Settlement was entered into by and between the Plaintiffs and Defendants in this matter, but was not approved by some of the Intervenors.

The Court should point out that the State Legislature will have still a third opportunity to propose a permanent remedy consistent with this Court's November 8, 1989 Order should it convene, and should it pass legislation in April or May of 1990.

The plan which follows is strictly an interim plan for the 1990 elections affecting 115 State District Court judicial seats in the nine counties in action. Upon consideration of the Motions, Responses, Objections, letters, exhibits, attachments and arguments of the parties, the Court is of the opinion that the following Orders are appropriate. Accordingly,

IT IS ORDERED that the Joint Motion of Plaintiffs,

Plaintiff-Intervenors and the Attorney General of Texas for Entry of a Proposed Interim Plan is hereby GRANTED IN PART and DENIED IN PART in the following respects:

1. All Defendants and those acting in concert are hereby enjoined from calling, holding, supervising and certifying elections for State District Court Judges in Harris, Dallas, Tarrant, Bexar, Travis, Jefferson, Lubbock, Ector and Midland Counties under the current at-large scheme.

2. For the 1990 elections, according to the Secretary of State of Texas, one hundred fifteen (115) District Court elections are scheduled in the counties affected by this Court's Order. The following number of District Courts are up for election by respective county: Harris (36); Dallas (32); Tarrant (14); Bexar (13); Travis (6); Jefferson (6); Lubbock (3); Ector (3); and Midland (2).

Under this Interim Plan, District Court Elections in Harris, Dallas, Tarrant and Bexar Counties shall be selected from existing State Legislative House District lines as indicated in Attachment A. District Court Elections in Travis County shall be from existing Justice of the Peace

Precinct Lines. See Attachment A. District Court Elections in Jefferson, Lubbock, Ector and Midland Counties shall be according to existing County Commissioner Precinct Lines.

Id. Each county shall be designated by a District Number, and each election unit by subdistrict number.

3. Each candidate shall run within a designated subdistrict and be elected by the voters in the subdistrict. Consistent with the Texas Constitution, each candidate must be a resident of his or her designated judicial district (which is countywide), but need not be a resident of the election subdistrict.

4. Elections shall be non-partisan. Each candidate shall select the election subdistrict in which he or she will run by designated place. Candidates in Dailas, Tarrant, Bexar, Ector and Midland Counties shall file an application for a place on the election ballot with the County Elections Administrator. Tex. Elec. Code Ann. §31.031 et seq. (Vernon 1986). Candidates in Harris, Travis, Jefferson and Lubbock Counties shall file such an application with the County Clerk of those counties or the County Tax Assessor-

Collector, depending on the practice of that particular county. Tex. Elec. Code Ann. §§31.1031 *et seq.*, 31.091 (Vernon 1986).

5. All terms of office under this Interim Plan shall be for four (4) years. Tex. Const. Art. V, § (1976, amended 1985). This Court is of the opinion that a two-year term is unfair to both those beginning and those ending their judicial careers.

6. Elections shall take place the first Saturday of May, 1990, with Run-off Elections to take place the first Saturday of June, 1990. Tex. Elec. Code Ann. §41.001(b)(5) (Vernon Supp. 1989).

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on March 26, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

8. In 1991, the Administrative Judge of the countywide district shall designate:

(1) Any courts of specialization in terms of

docket preference; and

(2) The District Court numbers in use prior to the Interim Plan's adoption. Successful incumbents shall have preference in such designation.

9. Current jurisdiction and venue of the District Courts remain unaffected, subject to modification by rule of the Supreme Court of Texas.

10. There shall be no right of recusal of judges elected under this plan. This Court is of the view that such a measure would be extremely disruptive to District Court dockets, administratively costly and could be the source of abuse by attorneys attempting to gain continuances of their cases.

IT IS FURTHER ORDERED that the above *Interim Plan* applies only to the 1990 State District Court Judicial Elections in the nine target counties at issue in this case. If the Texas Legislature fails to fashion a permanent remedy by way of a Special Called Session in the spring of 1990, then this Court will put into effect a Permanent Plan for the election of State District Court Judges in the nine target

counties in question.

IT IS FURTHER ORDERED that the Motions of Defendant-Intervenor JUDGE SHAROLYN WOOD, Defendant-Intervenor JUDGE HAROLD ENTZ and the State Defendants to Certify this Court's Memorandum Opinion and Order of November 8, 1989 as modified for clerical corrections on November 27, 1989 and December 26, 1989 for Interlocutory Appeal pursuant to 28 U.S.C. §1292(b) is hereby GRANTED IN PART.

IT IS FURTHER ORDERED that to the extent that such Motions request a stay of further proceedings in the above captioned cause such Motions are hereby DENIED.

IT IS FURTHER ORDERED that the Motion of Bexar County Judges TOM RICKOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDEN to Intervene as Defendants in the above captioned cause is hereby DENIED.

This Court, of course, has granted the right for an Interlocutory Appeal. The request to stay proceedings pending the appeal is DENIED, because the Court does not

feel that District Judges should be continued in office for an indefinite period of time. The right of the electorate to select judges in the year 1990 should not be denied unless, of course, interim action is taken by the Texas Legislature which changes the method of the selection and election of judges. The pressing need for the administration of justice in our state courts is recognized. It is the opinion of this Court that the plan set forth herein is the least disruptive that can be effected at this juncture. To allow Primary Elections in 1990 to be held in the same manner as they were in 1988 would be contra to the dictates of Fifth Circuit law and the Congressional Mandate of the Voting Rights Acts. Recognition that the November 8, 1989 Judgment has far-reaching effects is the reason for the allowance of an expedited appeal, and again the Court would encourage the Governor to call a Special Session to address the matter and, further, would request that the State Legislature remedy the current situation, as the Court is firmly of the opinion that any remedy other than this interim remedy should be done by duly elected legislators.

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SIGNED and ENTERED this 2nd day of January, 1990.

LUCIUS D. BUNTON
Chief Judge

Attachment A

HARRIS COUNTY
(District 401)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	401	Harris	*HD-125
2	401	Harris	HD-126
3	401	Harris	HD-127
4	401	Harris	HD-128
5	401	Harris	HD-129
6	401	Harris	HD-130
7	401	Harris	HD-131
8	401	Harris	HD-132
9	401	Harris	HD-133
10	401	Harris	HD-134
11	401	Harris	HD-135
12	401	Harris	HD-136
13	401	Harris	HD-137
14	401	Harris	HD-138
15	401	Harris	HD-139
16	401	Harris	HD-140
17	401	Harris	HD-141
18	401	Harris	HD-142
19	401	Harris	HD-143
20	401	Harris	HD-144
21	401	Harris	HD-145
22	401	Harris	HD-146
23	401	Harris	HD-147
24	401	Harris	HD-148
25	401	Harris	HD-149
26	401	Harris	HD-150
27	401	Harris	HD-132
28	401	Harris	HD-139
29	401	Harris	HD-147
30	401	Harris	HD-148
31	401	Harris	HD-131

32	401	Harris	HD-146
33	401	Harris	HD-143
34	401	Harris	HD-142
35	401	Harris	HD-141
36	401	Harris	HD-138

* "HD" indicates Texas House of Representatives Districts.

DALLAS COUNTY
(District 402)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	402	Dallas	HD-98
2	402	Dallas	HD-99
3	402	Dallas	HD-100
4	402	Dallas	HD-101
5	402	Dallas	HD-102
6	402	Dallas	HD-103
7	402	Dallas	HD-104
8	402	Dallas	HD-105
9	402	Dallas	HD-106
10	402	Dallas	HD-107
11	402	Dallas	HD-108
12	402	Dallas	HD-109
13	402	Dallas	HD-110
14	402	Dallas	HD-111
15	402	Dallas	HD-112
16	402	Dallas	HD-113
17	402	Dallas	HD-114
18	402	Dallas	HD-100
19	402	Dallas	HD-114
20	402	Dallas	HD-111
21	402	Dallas	HD-110
22	402	Dallas	HD-102
23	402	Dallas	HD-108
24	402	Dallas	HD-107
25	402	Dallas	HD-106
26	402	Dallas	HD-105
27	402	Dallas	HD-104
28	402	Dallas	HD-103
29	402	Dallas	HD-98
30	402	Dallas	HD-99
31	402	Dallas	HD-101
32	402	Dallas	HD-109

TARRANT COUNTY
(District 403)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	403	Tarrant	HD-89
2	403	Tarrant	HD-90
3	403	Tarrant	HD-91
4	403	Tarrant	HD-92
5	403	Tarrant	HD-93
6	403	Tarrant	HD-94
7	403	Tarrant	HD-95
8	403	Tarrant	HD-96
9	403	Tarrant	HD-97
10	403	Tarrant	HD-90
11	403	Tarrant	HD-95
12	403	Tarrant	HD-94
13	403	Tarrant	HD-93
14	403	Tarrant	HD-92

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BEXAR COUNTY
(District 404)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	404	Bexar	HD-115
2	404	Bexar	HD-120
3	404	Bexar	HD-116
4	404	Bexar	HD-124
5	404	Bexar	HD-123
6	404	Bexar	HD-122
7	404	Bexar	HD-121
8	404	Bexar	HD-118
9	404	Bexar	HD-124
10	404	Bexar	HD-117
11	404	Bexar	HD-119
12	404	Bexar	HD-118
13	404	Bexar	HD-115

TRAVIS COUNTY
(District 405)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	405	Travis	**JP-1
2	405	Travis	JP-2
3	405	Travis	JP-3
4	405	Travis	JP-4
5	405	Travis	JP-5
6	405	Travis	JP-4

** "JP" indicates Justice of the Peace Precincts.

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JEFFERSON COUNTY
(District 406)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	406	Jefferson	***CC-1
2	406	Jefferson	CC-2
3	406	Jefferson	CC-3
4	406	Jefferson	CC-4
5	406	Jefferson	CC-4
6	406	Jefferson	CC-3

*** "CC" indicates County Commissioner Precincts.

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LUBBOCK COUNTY
(District 407)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	407	Lubbock	CC-3
2	407	Lubbock	CC-4
3	407	Lubbock	CC-2

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ECTOR COUNTY
(District 408)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	408	Ector	CC-2
2	408	Ector	CC-3
3	408	Ector	CC-4

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MIDLAND COUNTY
(District 409)

<u>PLACE</u>	<u>DISTRICT NUMBER</u>	<u>COUNTY</u>	<u>SUBDIST. NUMBER</u>
1	409	Midland	CC-3
2	409	Midland	CC-4

FILED JAN 11, 1990

ORDER

BEFORE THIS COURT is the Motion of Attorney General Jim Mattox on behalf of the State of Texas to Alter this Court's Order of January 2, 1990; the Response thereto of Harris County District Judge Sharolyn Wood; and the Response thereto of Plaintiffs LULAC et al., Plaintiff-Intervenors Jesse Oliver, et al., and Plaintiff-Intervenors Houston Lawyers Association et al. Having considered said Motion and Responses, the Court is of the opinion that said Motion should be denied.

The Court is further of the opinion that other changes to certain terms of the injunction contained in that January 2, 1990 Order are proper. Specifically, the Court herein modifies the Order for the limited purpose of delaying the elections ordered pursuant to its Order, and removing the expedited rights of appeal previously granted in this matter.

The Court believes that delaying judicial elections pursuant to its Order of January 2, 1990 is desirable for several reasons. First, the Court notes that Governor Bill

Clements recently called a special session of February 27, 1990, to deal specifically with Texas' system of selecting judges. In the interests of comity and Federalism, legislatively directed remedial measures are preferable to measures ordered by this Court. Delaying the judicial elections ordered by this Court will serve these interests by giving the Legislature additional time. Second, judicial elections will still take place in 1990 under the modified Order, thus minimizing disruption of the Texas judiciary. Third, delaying court-ordered judicial elections will provide additional time for the United States Department of Justice to consider any remedy adopted by the Legislature before such elections occur. Fourth, delaying these elections will remove the need for expedited appeal to the Fifth Circuit by providing additional time for that Court to consider and rule upon this Court's Order before court-ordered judicial elections occur.

The Court urges the Legislature to consider in its deliberations a quotation from President Harry S. Truman, who said, "[w]e must build a better world, a far better

world--one in which the eternal dignity of man is respected."

I. The Attorney General's Motion is Properly Asserted Pursuant to Rule 59(e), Fed. R. Civ. P., and This Court Retains Jurisdiction to Modify Its Order of January 2, 1990.

The Defendant-Intervenor Judge Wood of Harris County appears to question the effect of the Attorney General's Motion on the notices of appeal filed in this case by herself and Judge Entz, and the powers of this Court to modify the terms of the injunction contained in its Order of January 2, 1990. There is no serious dispute before the Court that the parties to this case have the right under 28 U.S.C. Section 1292(a)(1) to appeal this Court's Order of January 2, 1990. If that Order were a judgment as to which the Attorney General's Motion is properly asserted under Rule 59(e), then the Parties' notices of appeal are ineffective, the Court retains jurisdiction to modify the judgment, and the deadlines for appeal are extended according to Fed. R. App. P. 4(b)(4). The Court believes that Order is such a judgment, and that this is the correct analysis.

A "judgment" for purposes of Rule 59(e), which provides for the amendment of a judgment and the postponement of the time for filing an appeal, is defined in Rule 54(a). See Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE Section 2651 and cases cited therein. Rule 54(a) defines judgment as an "appealable order." 28 U.S.C. Section 1292(b) undisputedly makes this Court's Order of January 2, 1990 appealable of right. Therefore a motion to alter or amend the judgment is properly asserted under Rule 59(e).

The Attorney General's Motion would properly be brought under Rule 62(c), if jurisdiction of the case were already lodged in the court of appeals, for example where a Rule 59(e) motion was not timely made and appeal was taken, or a Rule 59(e) motion was made and ruled upon, and appeal subsequently taken.

The Court assumes for the purposes of this Motion that there exist other circumstances that would make a Rule 59(e) Motion improper here, although the Court takes pains to note that the parties have not cited the Court to such

circumstances, and the Court in examining its jurisdiction has so far found none. In that event, Judge Wood contends, the Attorney General's Motion is one properly asserted under Rule 62(c), under which Rule this Court's modification powers are curtailed.

The Court also assumes that its sua sponte alteration of a judgment, that is independent of and goes beyond the alteration requested by a party under Rule 59(e), might be reviewed under the standard of Rule 62(c). The problem is that the timely filing of a Rule 59(e) motion, which the Court believes has been done here, suspends the appeal process and renders Rule 62(c) technically inapplicable because the case is not on appeal. Absent appeal, a district court has complete power over its interlocutory orders. *Ideal Toy Corp. v. Sayco Doll Corp.*, 302 F.2d 623 (2nd Cir. 1962).

It is important to note that this Court has consistently voiced its preference for the Texas authorities devising a plan for judicial elections consistent with the Voting Rights Act, with reasonable dispatch, and therefore has considered

and styled its January 2, 1990 injunction as an interim plan. The Order is, of course, binding and effective if, and to the extent, the Legislature fails to act. If the Legislature devises an acceptable plan under the Voting Rights Act this lawsuit, and the Court's injunction along with it, would likely become moot. Of course, an argument could be made that this Court's interim plan of redistricting, because conditional in this sense, is not a judgment at all until the contingency has been removed, and therefore is not even appealable. In any event, this Court's overall plan of encouraging legislative redistricting is, the Court believes, relevant to considering, under the law of Rule 62(c), what constitutes a modification of an injunction "in aid of appeal."

In sum, the Federal Rules of Civil Procedure do not seem to provide a neat category for classifying motions on equitable remedies such as the one at issue. This Court is of the opinion that the Attorney General's Motion is one properly brought under Rule 59(e) because this Court's Order of January 2, 1990 is a "judgment" within the meaning of Rule 54(a). However, in the event this

characterization is error, as Judge Wood seems to contend it is, the Court believes it proper to apply the more restrictive analysis under Fed. R. Civ. P. Rule 62(b) as set out in cases cited by the parties.

II. Alternatively, This Court Possesses Jurisdiction to Make Modifications to Its January 2, 1990 Order as Ordered Herein Pursuant to Rule 62(b), Fed. R. Civ. P.

Judge Wood challenges this Court's jurisdiction to entertain a motion to modify its January 2, 1990 Order, and presumably as well the Court's jurisdiction to modify said Order sua sponte. However, despite Judge Wood's artful choice of quotations from pertinent case law, the Court is not persuaded that it lacks jurisdiction to make certain changes in its Order even if the injunction contained therein is properly on appeal.

Once appeal is taken from an interlocutory judgment (as the Court assumes for discussion purposes that it has been here), Fed. R. Civ. P. 62(c) provides that "the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal" The scope

of this Court's power under Rule 62(c) has most recently been the subject of analysis by the Fifth Circuit in *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817 (5th Cir. 1989). Under the holding in *Coastal*, this Court is definitely constrained insofar it lacks authority to dissolve the injunction on appeal. *Id.* at 821. But regarding less radical modifications, the Court is directed to limit the exercise of its power to "maintaining the status quo." *Id.* at 820.

Judge Wood would have the Court interpret "maintaining the status quo" to mean that this court may do nothing except "in aid of the appeal." *Willie v. Continental Oil Co.*, 746 F.2d 1041 (5th Cir. 1984). The Fifth Circuit applied this directive in *Willie* to divest the District Court of jurisdiction to modify a judgment under Rule 60(b) because of inadvertence or excusable neglect, where substantive rights of the parties were at stake. *Id.* at 1045. In *Willie*, the parties sought to have the District Court correct its judgment to incorporate a mistakenly-omitted stipulation regarding the percentage of liability to be borne by one of the defendants. The District Court was empowered to deny

such a motion because denial would be "in furtherance of the appeal". But had the District Court wished to grant the Rule 60(b) motion, leave of the Court of Appeals would have been required. *Id.* at 1046.

In the *Coastal* case, however, the Fifth Circuit seemed to impose a different standard of "maintaining the status quo," and defining that standard to mean that a district court may not take action, such as vacating an injunction, that would presumably divest the court of appeals from jurisdiction while the issue is on appeal. *Coastal, supra*, at 820. Cases cited in the *Coastal* opinion consistently deal with granting or staying injunctions during the pendency of appeal. *Id.* Consistent with the analysis expressed in the Attorney General's brief, this Court interprets *Coastal* to say that it may not vacate the injunction now in issue while it is on appeal. No such action is contemplated.

Even if the "in aid of appeal" standard set out in *Willie* should guide the Court, it would seem that the modifications now ordered, which primarily give the Legislature additional time to consider redistricting, does not violate that standard.

Accordingly, this Court's Order of January 2, 1990 will be amended.

IT IS ORDERED that this Court's Order of January 2, 1990 be, and is hereby amended pursuant to the following directives only.

Item numbered "6" at pages 6 and 7 is amended to read as follows:

6. Elections shall take place on November 6, 1990 with runoff elections, if and where necessary, on December 4, 1990.

Item numbered "7" at page 7 is amended to read as follows:

7. An application for a place on the non-partisan election ballot must be filed not later than 6:00 p.m. on September 19, 1990. Except as modified herein, all provisions of the Texas Election Code shall be applicable to the non-partisan elections herein ordered.

IT IS FURTHER ORDERED that any rights of expedited appeal granted in this matter be, and are hereby

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RESCINDED.

SIGNED AND ENTERED this 11th day of January,
1990.

s/_____
LUCIUS D. BUNTON
CHIEF JUDGE

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

**On Writs of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

SUPPLEMENTAL JOINT APPENDIX

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[Additional Counsel Listed on Inside Front Cover]

PETITIONS FOR WRITS OF CERTIORARI FILED
NOVEMBER 11, 1990 IN NO. 90-813, DECEMBER 14, 1990 IN NO. 90-974
CERTIORARI GRANTED JANUARY 18, 1991

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TABLE OF CONTENTS

1. Plaintiffs' Second Amended Complaint 2a



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS
(LULAC), *et al.*,

Plaintiffs,

HOUSTON LAWYERS' ASSOCIATION, *et al.*,

Plaintiff-Intervenors

vs.

CIVIL ACTION #
MO 88-CA-154

JIM MATTOX, Attorney General of the State
of Texas, *et al.*,

Defendants

SHAROLYN WOOD, and F. HAROLD ENTZ,
Defendant-Intervenors

PLAINTIFFS' SECOND AMENDED COMPLAINT

I. INTRODUCTION

1. The members of Plaintiffs LULAC, LULAC COUNCIL #4434 and LULAC COUNCIL #4451 and the named individual Plaintiffs are Mexican-American and Black citizens of the State of Texas. They bring this action pursuant to 42 U.S.C. 1971, 1973, 1983, 1988 to redress a

denial, under color of state law, of rights, privileges or immunities secured to Plaintiffs by the said laws and by the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

2. Plaintiffs seek a declaratory judgment that the existing at large scheme of electing district judges in the target areas of the State of Texas violates Plaintiffs' civil rights in that such method illegally and/or unconstitutionally dilutes the voting strength of Mexican-American and Black electors; Plaintiffs seek a permanent injunction prohibiting the calling, holding, supervising or certifying of any future elections for district judges under the present at large scheme in the target areas; Plaintiffs seek the formation of a judicial districting scheme by which district judges in the target areas are elected from districts which include single member districts; Plaintiffs seek costs and attorneys' fees.

II. JURISDICTION

3. Jurisdiction is based upon 28 U.S.C. 1343 (3) & (4), upon causes of action arising from 42 U.S.C. 1971, 1973, 1983, & 1988, and under the Fourteenth and Fifteenth

Amendments to the U.S. Constitution. Declaratory relief is authorized by 28 U.S.C. 2201 & 2202 and by Rule 57, F.R.C.P.

III. PLAINTIFFS

4. Plaintiff LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC) is a statewide organization whose members are United States Citizens of Mexican American and black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in the various counties.

5. LULAC Council No. 4434 is a local organization whose membership is composed of United States Citizens most of whom are of Mexican-American and Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Midland County. LULAC Council No. 4451 is a local organization whose membership is composed of United States Citizens most of whom are of Mexican-American or Black descent, and are resident taxpayers of the State of Texas, and are qualified to vote for district judges in Ector County.

6. Plaintiff CHRISTINA MORENO is a United States Citizen of Mexican-American descent and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

7. Plaintiff AQUILLA WATSON is a Black United States Citizen and is a resident taxpayer of the State of Texas, and is qualified to vote for district judges in Midland County.

8. Plaintiff MATTHEW W. PLUMMER, Sr. is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Harris County.

9. Plaintiff JIM CONLEY is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Bexar County.

10. Plaintiff VOLMA OVERTON is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Travis County.

11. Plaintiff WILLARD PEN CONAT is a Black

United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Fort Bend County.

12. Plaintiff GENE COLINS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Ector County.

13. Plaintiff AL PRICE is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Jefferson County.

14. Plaintiff THEODORE HOGROBROOKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Smith County.

15. Plaintiff ERNEST M. DECKARD is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Smith County.

16. Plaintiff MARY ELLEN HICKS is a Black United States Citizen and is a resident taxpayer of the State of Texas; she is qualified to vote for district judges in

Tarrant County.

16a. Plaintiff REV. JAMES THOMAS is a Black United States Citizen and is a resident taxpayer of the State of Texas; he is qualified to vote for district judges in Galveston County.

IV. PLAINTIFF INTERVENORS

17. Members of the HOUSTON LAWYERS' ASSOCIATION, ALICE BONNER, WELDON BERRY, FRANCIS WILLIAMS, REV. WILLIAM LAWSON, DELOYD T. PARKER, BENNIE MCGINTY, JESSE OLIVER, FRED TINSLEY, JOAN WINN WHITE, and Members of THE BLACK LEGISLATIVE CAUCUS are Black United States Citizens and are resident taxpayers of the State of Texas; they are qualified to vote for district judges in Texas.

V. DEFENDANTS

18. Defendant JIM MATTOX is the Attorney-General of the State of Texas, and is the chief law enforcement officer of the state and as such, is charged with the responsibility to enforce the laws of the state. Defendant

JACK RAINS is the Secretary of State of the State of Texas, and is the chief elections officer of the state and as such, is charged with the responsibility of administering the election laws of the state. Defendants THOMAS R. PHILLIPS, JOHN F. ONION, RON CHAPMAN, THOMAS J. STOVALL, JAMES F. CLAWSON, JR., JOE E KELLY, JOE B. EVINS, SAM M. PAXSON, WELDON KIRK, CHARLES J. MURRAY, RAY D. ANDERSON, LEONARD DAVIS and JOE SPURLOCK, II are members of the JUDICIAL DISTRICTS BOARD created by Art. V. Sec. 7a of the Texas Constitution, and pursuant to Art. 24.941 et. seq. Texas Government Code. They have the duty to reapportion judicial districts within the State of Texas.

VI. FACTUAL ALLEGATIONS

19. District judges are elected either from judicial districts which are coterminous with and wholly contained within a county, or from judicial districts which are composed of several entire counties.

20. In those counties which contain more than one

judicial district, the present election system is an at large scheme with the equivalent of numbered places, the majority rule requirement, and staggered terms.

21. The following counties, which are being challenged in this lawsuit, elect the following number of district judges and, according to the 1980 U.S. Census, contain the following population:

<u>COUNTY</u>	<u># OF JUDGES</u> <u>ELECTED</u>	<u>TOTAL</u> <u>POP.</u>	<u>S.S.</u> <u>POP. (%)</u>	<u>BLK</u> <u>POP. (%)</u>	<u>CM. %*</u>
Harris	59	2,409,544	369,075(15.3)	473,698(19.7)	35.0
Dallas	36	1,556,549	154,560(9.9)	287,613(18.5)	28.4
Bexar	19	988,800	460,911(46.6)	69,201(7.0)	53.6
Tarrant	23	860,880	67,632(7.9)	101,183(11.8)	19.7
Travis	13	419,335	72,271(17.2)	44,988(10.7)	27.9
Jefferson	8	250,938	10,279(4.1)	70,810(28.2)	32.3
Lubbock	5	211,651	41,428(19.6)	15,780 (7.5)	27.0
Galveston	5	195,940	23,557(12.0)	36,328(18.5)	30.6
McLennan	4	170,755	14,988(8.8)	27,254(16.0)	24.7
Fort Bend	3	130,846	26,656(20.4)	20,420(15.6)	36.0
Smith	4	128,366	4,037(3.1)	28,215(22.0)	25.1

10a

Ector	4	115,374	24,831(21.5)	5,154 (4.5)	26.0
Midland	3	82,636	12,323(14.9)	7,119 (8.6)	23.5
El Paso, Hudspeth, and Culberson**	11	485,942	282,691(58.2)	18,162 (3.7)	61.9

* Combined Minority

** Eight district judges are elected at large within El Paso County; the other three are elected at large within the three county area of El Paso, Hudspeth, and Culberson Counties.

22. The following counties comprise a judicial area that elects three (3) judges at large: EL PASO, CULBERSON, and HUDSPETH. This area contains enough minorities that are sufficiently geographically concentrated that if single member districts were created, at least one of those districts would be able to elect a minority.

23. The above areas elect 197 district judges. Each area contains enough minorities that are sufficiently geographically concentrated so that if single member districts were created, at least one of those districts in each area would be able to elect a minority.

24. Upon information and belief, in the above named areas minorities are politically cohesive.

25. Upon information and believe in the above cited areas, the white majority votes sufficiently as a block to enable it--in the absence of special circumstances, such as the minority candidate running unopposed--usually to defeat the minority's preferred candidate.

26. Upon information and belief, in the above challenged areas, the at large election scheme interacts with social and historical conditions to cause an inequality in the opportunity of hispanic and/or black voters to elect representatives of their choice as compared to white voters.

27. Upon information and belief, the following are the names of the presently sitting judges' elected from the above counties:

<u>COURT</u>	<u>JUDGE</u>	<u>COUNTY</u>	<u>VOTING RACE/ PRECINCT ETHNIC</u>
11th	Mark Davidson	Harris	224 W
55th	Reagan Cartwright	Harris	178 W
61st	Shearn Smith	Harris	** W
80th	William R. "Bill Powel	Harris	040 W
113th	Geraldine B. Tennant	Harris	227 W
125th	Don E. Wittig	Harris	118 W
127th	Sharolyn P. Wood	Harris	282 W
129th	Hugo A. Touchy	Harris	385 W
133rd	Lamar McCorkle	Harris	** W

151st	Alice Oliver			
	Trevathan	Harris	441	W
152nd	Jack O'Neill	Harris	493	W
157th	Felix Salazar, Jr.	Harris	134	H
164th	Pete Solito	Harris	217	W
165th	Ken Harrison	Harris	413	W
174th	George H. Godwin	Harris	015	W
176th	James Brian Rains	Harris	116	W
177th	Miron A. Love	Harris	034	W
178th	William T. "Bill"			
	Harmon	Harris	129	W
179th	J. Mike Wilkinson	Harris	456	W
180th	Patricia R. Lykos	Harris	626	W
182th	Donald K. Shipley	Harris	261	W
183th	Jay W. Burnett	Harris	567	W
184th	Robert N. Burdette	Harris	356	W
185th	Carl Walker, Jr.	Harris	138	B
189th	Richard W. Millard	Harris	056	W
190th	Wyatt H. Heard	Harris	227	W
208th	Thomas H. Routt	Harris	136	B
209th	Michael T.			
	McSpadden	Harris	148	W
215th	Eugene Chambers	Harris	663	W
228th	Ted Poe	Harris	658	W
230th	Joe Kegans	Harris	222	W
232rd	A.D. Azios	Harris	178	H
234th	Ruby K. Sondock	Harris	434	W
245th	Henry G. Schuble	Harris	305	W
246th	John W. Peavy, Jr.	Harris	228	B
247th	Charles Dean			
	Huckabee	Harris	628	W
248th	Woody R. Densen	Harris	034	W
257th	Norman R. Lee	Harris	628	W
262nd	Doug Shaver	Harris	200	W
263rd	Charles J. Hearn	Harris	351	W
269th	W. David West	Harris	219	W
270th	Ann Tyrrell			
	Cochran	Harris	217	W

280th	Melinda Furche			
	Harmon	Harris	129	W
281st	Louis M. Moore	Harris	297	W
295th	Dan Downey	Harris	441	W
308th	Bob W. Robertson	Harris	430	W
309th	John D. Montgomery	Harris	518	W
310th	Allen J. Daggett	Harris	577	W
311th	Bill Elliott	Harris	221	W
312th	Robert S.			
	Webb, III	Harris	200	W
313th	Robert L. Lowery	Harris	371	W
314th	Robert R. Baum	Harris	296	W
315th	Eric G. Andell	Harris	183	W
333rd	Davie L. Wilson	Harris	466	W
334th	Russel T. Lloyd	Harris	316	W
337th	Jim Barr	Harris	432	W
338th	Mary Bacon	Harris	344	W
339th	Norman E. Lanford	Harris	050	W
351st	Lupe Salinas	Harris	115	H
14th	John M. Marshall	Dallas	1174	W
44th	Candace Tyson	Dallas	1203	W
68th	Gary B. Hall	Dallas	1123	W
95th	Joe B. Brown	Dallas	4418	W
101st	Joseph B. Morris	Dallas	1227	W
116th	Frank Andrews	Dallas	1129	W
134th	Anne A. Packer	Dallas	1176	W
160th	Mark Whittington	Dallas	4418	W
162nd	Catherine J. Crier	Dallas	2277	W
191st	David Brooks	Dallas	2242	W
192nd	Merrill L. Hartman	Dallas	2266	W
193rd	Michael J. O'Neill	Dallas	2260	W
194th	Harold Entz, Jr.	Dallas	1185	W
195th	Joe Kendall	Dallas	1171	W
203rd	Thomas B. Thorpe	Dallas	1103	W
204th	Richard D. Mays	Dallas	1148	W
254th	Dee Miller	Dallas	1176	W
255th	Don D. Koons	Dallas	1227	W
256th	Carolyn Wright	Dallas	3302	B
265th	Keith T. Dean	Dallas	1122	W

282nd	Tom Price	Dallas	1202	W
283rd	Jack Hampton	Dallas	2271	W
291st	Gerry Meier	Dalias	1209	W
292nd	Michael E. Keasler	Dallas	4406	W
298th	Adolph Canales	Dallas	1216	H
301st	Robert O'Donnell	Dallas	2203	W
302nd	Frances A. Harris	Dallas	2222	W
303rd	N. Sue Lykes	Dallas	4437	W
304th	Harold C. Gaither, Jr.	Dallas	4516	W
305th	Catherine J. Stayman	Dallas	2253	W
330th	Theo Bedard	Dallas	1185	W
Crim Dist. 1	Ron Chapman	Dallas	2241	W
Crim Dist. 2	Larry W. Baraka	Dallas	4453	B
Crim Dist. 3	Mark Tolle	Dallas	1187	W
Crim Dist. 4	Frances J. Maloney	Dallas	1145	W
Crim Dist. 5	Pat McDowell	Dallas	1162	W
70th	Gene Ater	Ector	**	W
161st	Tryon D. Lewis	Ector	**	W
244th	Joseph Connally	Ector	**	W
358th	Bill McCoy	Ector	**	W
19th	Bill Logue	McLennan	**	W
54th	George H. Allen	McLennan	**	W
74th	Derwood Johnson	McLennan	**	W
170th	Joe Johnson	McLennan	**	W
17th	Fred W. Davis	Tarrant	2052	W
48th	William L. Hughes, Jr.	Tarrant	2143	W
67th	George Allen Crowley	Tarrant	4095	W
96th	Jeff Walker	Tarrant	3101	W
141st	Dixon W. Holman	Tarrant	2266	W

153rd	Sidney C.			
	Farrar, Jr.	Tarrant	4130	W
213rd	George S. Kredell	Tarrant	2352	W
231st	Maryellen W. Hicks	Tarrant	1104	B
233rd	William H. Brigham	Tarrant	3151	W
236th	Albert L. White, Jr.	Tarrant	1004	W
297th	Everett Young, Jr.	Tarrant	1004	W
322nd	Frank W.			
	Sullivan, III	Tarrant	3151	W
323rd	Scott D. Moore	Tarrant	4343	W
324th	Brian A. Carper	Tarrant	2012	W
325th	Robert L. Wright	Tarrant	1081	W
342nd	Joe Bruce			
	Cunningham	Tarrant	1081	W
348th	Michael D.			
	Schattman	Tarrant	3151	W
352nd	Bruce Auld	Tarrant	3286	W
360th	V. Sue Koenig			
	Stephenson	Tarrant	3289	W
Crim				
Dist. 1	Louis E. Sturns	Tarrant	4203	B
Crim				
Dist. 2	Lee Ann Dauphinot	Tarrant	1189	W
Crim				
Dist. 3	Don Leonard	Tarrant	1004	W
Crim				
Dist. 4	Joe Drago, III.	Tarrant	1022	W
142nd	Pat M. Baskin	Midland	205	W
238th	Van Culp	Midland	307	W
318th	Dean Rucker	Midland	212	W
53rd	Mary Pearl			
	Williams	Travis	237	W
98th	Jeanne Mourer	Travis	207	W
126th	Joe Hart	Travis	320	W
147th	Mace B.			
	Thurman, Jr.	Travis	256	W
167th	Bob Jones	Travis	328	W
200th	Paul R. Davis Jr.	Travis	320	W
201st	Jerry Dellana	Travis	324	W

250th	Harley Clark	Travis	145	W
261st	Peter M. Lowry	Travis	326	W
299th	Jon N. Wisser	Travis	262	W
331st	Robert A. Perkins	Travis	215	W
345th	Scott McCown	Travis	236	W
353rd	Joe Dihrell	Travis	328	W
58th	Ronald L. Walker	Jefferson	73	W
60th	Gary Sanderson	Jefferson	83	W
136th	Jack R. King	Jefferson	5	W
172nd	Thomas A. Thomas	Jefferson	46	W
252nd	Leonard L.			
	Giblin, Jr.	Jefferson	9	W
279th	Robert P. Walker	Jefferson	46	W
317th	James M. Farris	Jefferson	62	W
Cirm.				
Dis.Ct.	Lawrence Gist	Jefferson	65	W
10th	Ed. Harris	Galveston	**	W
56th	Allan Lerner	Galveston	**	W
122nd	Henry G. Delchite	Galveston	**	W
212th	Roy C. Engelke	Galveston	**	W
306th	Andrew Z. Baker	Galveston	**	W
72nd	Blair Cherry	Lubbock	9	W
99th	Thomas L. Olinlye	Lubbock	11	W
137th	Cecil G. Puryear	Lubbock	18	W
140th	William R.			
	"Bill" Shaver	Lubbock	28	W
237th	John R. McFall	Lubbock	17	W
240th	Charles A.			
	Dickerson	Fort Bend	**	W
268th	Brady G. Elliott	Fort Bend	**	W
328th	Thomas O.			
	Stansbury	Fort Bend	**	W
7th	W.E. "Bill" Coats	Smith	16	W
114th	Cynthia Stevens			
	Kent	Smith	37	W
241st	Joe Tunnell	Smith	51	W
321st	Ruth Jackson Blake	Smith	38	W
37th	John Cornyn, III	Bexar	3020	W
45th	Carol R. Haberman	Bexar	3079	W

57th	Charles Gonzales	Bexar	3019	H
73rd	Paul Andrew Mireles	Bexar	3011	H
131st	Rose Spector	Bexar	3018	W
144th	Susan Reed	Bexar	3018	W
166th	Peter Michael Curry	Bexar	3025	W
175th	Phil G. Chavarria, Jr.	Bexar	3019	H
186th	James E. Barlow	Bexar	2009	W
187th	Pat Priest	Bexar	3063	W
224th	Carolyn H. Spears	Bexar	3104	W
225th	John J. Specia, Jr.	Bexar	3048	W
226th	Sid L. Harle	Bexar	3102	W
227th	Mike Machado	Bexar	3038	H
285th	Michael Peden	Bexar	3074	W
288th	Raul Rivera	Bexar	3012	H
289th	Tom Rickoff	Bexar	3089	W
150th	Carleton Spears	Bexar	3108	W
290th	Sharon Sands			
	Mac Rea	Bexar	3090	W
41st	Mary Ann Bramblett	El Paso	088	W
65th	Eduardo S. Marquez	El Paso	**	H
120th	Brunson D. Moore	El Paso	013	W
168th	Jose Troche	El Paso	005	H
171st	Peter S. Pecas	El Paso	006	H
243rd	Herbert E. Marsh, Jr.	El Paso	093	W

346th	Jose J. Baca	El Paso	011	H
327th	Enrique H. Pena	El Paso	012	H
34th	William E. Moody	Hudspeth, Culberson, El Paso	007	W
		(El Paso County)		
205th	Sam W. Callan	Hudspeth, Culberson, El Paso	074	W
		(El Paso County)		
210th	Sam M. Paxson	Hudspeth, Culberson, El Paso	011	W
		(El Paso County)		

*W-White
B-Black
H-Hispanic

**This information is being gathered

VII. CAUSES OF ACTION

28. The present at large scheme of electing district judges, in the targeted areas, intentionally created and/or maintained with a discriminatory purpose, violates the civil rights of Plaintiffs by diluting their votes, in violation of the United States Constitution and/or,

29. The present at large scheme of electing district judges, in the targeted areas, results in a denial or abridgement of the right to vote of the Plaintiffs on account of their race or color in that the political processes leading

to nomination or election of district judges are not equally open to participation by Plaintiffs in that they have less opportunity than other members of the electorate to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act.

VIII. IMMUNITIES

30. Qualified and absolute immunity do not protect the Defendants because Plaintiffs seek only injunctive and declaratory relief and attorneys' fees. Furthermore, absolute immunity does not protect Defendants because they do not act in any of the capacities which receive immunity at common law. The Defendants are not entitled to Eleventh Amendment immunity because Plaintiffs seek only injunctive and declaratory relief and attorneys' fees.

IX. EQUITIES

31. Plaintiffs have no adequate remedy at law other than the judicial relief sought herein, and unless the Defendants are enjoined from continuing the present at large scheme, Plaintiffs will be irreparably harmed by the continuing violation of their statutory and constitutional

rights. The illegal and unconstitutional conditions complained of preclude the adoption of remedial provisions by the electorate. The present electoral scheme is without any legitimate or compelling governmental interest and it arbitrarily and capriciously cancels, dilutes and minimizes the force and effect of the Plaintiffs' voting strength.

XX. ATTORNEYS' FEES

32. In accordance with 42 U.S.C. 1973-1(e) and 1988, Plaintiffs are entitled to recover reasonable attorneys' fees as part of their costs.

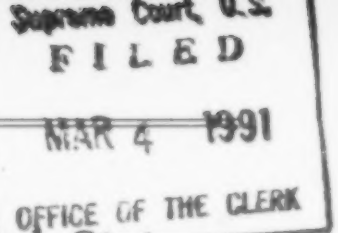
XI. PRAYER

33. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein; that a declaratory judgment be issued finding that the existing method of electing district judges is unconstitutional and/or illegal, null and void; that the Defendants be permanently enjoined from calling, holding, supervising or certifying any further elections for district judges under the present at large scheme; that the Court order that district judges in the targeted counties be elected in a system which

contains single member districts; adjudge all costs against Defendants, including reasonable attorneys' fees; retain jurisdiction to render any and all further orders that this Court may from time to time deem appropriate; and grant any and all further relief both at law and in equity to which these Plaintiffs may show themselves to be entitled.

Respectfully submitted,





In The
Supreme Court of the United States

October Term, 1990

LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, ET AL.

and

JESSE OLIVER, ET AL.,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

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Jesse Oliver, et al.



QUESTION PRESENTED FOR REVIEW

Does Section 2 of the Voting Rights Act, 42 U.S.C. 1973, apply to dilution claims in judicial election systems?

LIST OF PARTIES

Plaintiffs:

League of United Latin American Citizens (Statewide)
LULAC Local Council 4434
LULAC Local Council 4451
Christina Moreno
Aquilla Watson
Joan Ervin
Matthew W. Plummer, Sr.
Jim Conley
Volma Overton
Gene Collins
Al Price
Judge Mary Ellen Hicks
Rev. James Thomas

Plaintiff-Intervenors:

Harris County:

Houston Lawyers' Association
Alice Bonner
Weldon Berry
Francis Williams
Rev. William Lawson
DeLoyd T. Parker
Bennie McGinty

Dallas County:

Jesse Oliver
Fred Tinsley
Joan Winn White

Defendants:

William P. Clements, Governor, State of Texas (dismissed
prior to trial)
Jim Mattox, Attorney General of Texas
(Dan Morales, successor in office)
George Bayoud, Secretary of State

LIST OF PARTIES – continued

(John Hannah, Jr., successor in office)
 Texas Judicial Districts Board
 Thomas R. Phillips, Chief Justice, Texas Supreme Court
 Mike McCormick, Presiding Judge, Court of Criminal Appeals
 Ron Chapman, Presiding Judge, 1st Admin. Judicial Region
 (Pat McDowell, successor in office)
 Thomas J. Stovall, Jr., Presiding Judge, 2nd Admin. Judicial Region
 James F. Clawson, Jr., Presiding Judge, 3rd Admin. Judicial Region
 (B. B. Schraub, successor in office)
 John Cornyn, Presiding Judge, 4th Admin. Judicial Region
 Robert Blackmon, Presiding Judge, 5th Admin. Judicial Region
 (Darrell Hester, successor in office)
 Sam B. Paxson, Presiding Judge, 6th Admin. Judicial Region
 (William E. Moody, successor in office)
 Weldon Kirk, Presiding Judge, 7th Admin. Judicial Region
 Jeff Walker, Presiding Judge, 8th Admin. Judicial Region
 Ray D. Anderson, Presiding Judge, 9th Admin. Judicial Region
 Joe Spurlock II, President, Texas Judicial Council
 Leonard E. Davis

Defendant-Intervenors:

Judge Sharolyn Wood (Harris County)
 Judge Harold Entz (Dallas County)
 Bexar County:
 Judge Tom Rickoff
 Judge Susan D. Reed

LIST OF PARTIES – continued

Judge John J. Specia, Jr.
Judge Sid L. Harle
Judge Sharon Macrae
Judge Michael D. Pedan

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No. 90-974

In The
Supreme Court of the United States
October Term, 1990

LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, ET AL.

and

JESSE OLIVER, ET AL.,

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court
Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONERS

Petitioners, the League of United Latin American Citizens, et al., and Jesse Oliver, et al., pray that the decision of the United States Court of Appeals for the Fifth Circuit, *en banc*, be reversed.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas has not been reported, but is included in the Appendix.¹ (Pet. App., pp. 183a-304a.) The opinion of a panel of the United States Court of Appeals for the Fifth Circuit is reported at 902 F. 2d 293 (5th Cir. 1990). The order granting rehearing en banc (*sua sponte*) is reported at 902 F. 2d 322 (5th Cir. 1990). The opinion of the United States Court of Appeals for the Fifth Circuit, *en banc*, is reported at 914 F. 2d 620 (5th Cir. 1990). (Pet. App., pp. 1a-182a.)

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1990. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254(1). Petition for Certiorari was docketed in this Court on December 14, 1990. *Certiorari* was granted by this Court on January 18, 1991.

¹ All references to the Appendix refer to the Petitioners' Appendix (Pet. App.) filed in No. 90-813, Houston Lawyers' Assn., et al. v. Jim Mattox, et al., with the Petition for Writ of Certiorari, which was granted on January 18, 1991, and consolidated with this case for argument. These documents reproduced there are not reproduced in the Joint Appendix, pursuant to Rule 26.1.

STATUTES INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, as amended, provides as follows:

(a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b(f)(2), provides, in pertinent part, as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any

citizen of the United States to vote because he is a member of a language minority group.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides, in pertinent part, as follows:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person

shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with the section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provision of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

STATEMENT OF THE CASE

The Proceedings Below

This is a voting rights case brought by black and Hispanic citizens of and organizations within the State of Texas. On July 11, 1988, suit was filed in the United States District Court for the Western District of Texas under Section 2 of the Voting Rights Act, 42 U. S. C. 1973, and under 42 U. S. C. 1983, alleging violations of the Fourteenth and Fifteenth Amendments to the United States Constitution. Jurisdiction below was based upon 28 U. S. C. 1331.

At issue is the use of at-large elections in majority white judicial districts used to elect district judges.² The districts are contained within ten of Texas' 254 counties: Harris, Dallas, Bexar, Tarrant, Travis, Lubbock, Crosby, Midland, Ector, and Jefferson.

After a trial to the Court, the district judge entered findings of fact and conclusions of law, and found a violation of Section 2 of the Voting Rights Act in all ten counties. (Pet. App., at pp. 183a-304a.)³

In each county challenged, the trial court found for plaintiffs on each of the threshold *Gingles* factors, *Thornburg v. Gingles*, 478 U. S. 30 (1986):

² In Texas, the trial court of general jurisdiction is the district court. *Texas Constitution*, Art. 5, Sec. 8.

³ The Court did not find that the 1985 Amendment to the Texas Constitution allowing less than countywide judicial districts, if split by local referendum, was motivated by discriminatory intent. (Pet. App., at pp. 282a-283a; 301a-302a.) The Constitutional issue was not appealed by any party.

- the minority group was sufficiently concentrated so as to constitute a voting age majority in a single-member district, (Pet. App., at pp. 200a-209a), and
- the minority group voted cohesively, (Pet. App., at pp. 210a-275a), and
- a white voting bloc usually defeated the choice of the minority voters. (Pet. App., at pp. 210a-275a.)

In addition, the trial court found that voting in these counties was racially polarized, (Pet. App., at pp. 210a-275a), and that there was a lack of success of minority candidates. (Pet. App., at pp. 279a-281a.) As required, it made findings regarding the "typical factors," (Pet. App., at pp. 273a-285a) as discussed in the *Senate Report*, No. 97-417, 97th Congress 2d Sess., reprinted in 1982 U. S. *Code Cong. & Admin. News* at pp. 177 et seq., which is a part of the legislative history of the 1982 amendments to the Voting Rights Act. The district court found a history of discrimination against Blacks and Hispanics. The legacy of that discrimination is exhibited in a lower socioeconomic status of both groups. (Pet. App., at pp. 273a-275a.) It found that the election scheme is a numbered post system; that there is a majority vote requirement, and that the size of five of the counties enhance the problems of minorities when they seek office. (Pet. App., at pp. 275a-277a.) The court noted racial appeals in elections in Dallas County. (Pet. App. at p. 278a.)

Finally, based upon the "totality of the circumstances," the trial court found that minority voting strength was diluted in each of the ten counties. (Pet. App., at pp. 297a-301a.)

Although given an opportunity, the Texas Legislature failed to remedy the discriminatory at-large election system. Therefore, on January 2, 1990, the trial court enjoined further use of the at-large electoral system in these counties. Pursuant, in part, to an agreement between the plaintiffs and the Attorney General for the State of Texas, it ordered an interim election plan under which the counties were subdivided into election districts coincident with existing electoral boundaries for state representatives, or county commissioners, or justices of the peace.⁴

Acting upon emergency motions to stay, on January 11, 1990, the United States Court of Appeals for the Fifth Circuit stayed this interim plan pending appeal. On May 11, 1990, a panel of that court reversed the district court, holding 2-1 that at-large elections for trial judges are not covered by Section 2 of the Voting Rights Act. 901 F. 2d 293 (5th Cir. 1990). Four days later, pursuant to a majority vote of the active judges, the court ordered a rehearing *en banc*. On September 28, 1990, the *en banc* court reversed the trial court in a severely split opinion. 914 F. 2d 620 (5th Cir. 1990). (Pet. App., at pp. 1a-182a.)

The majority opinion, written by Judge Gee, 914 F. 2d 622-631, (Pet. App., at pp. 1a-35a), held that even though an intentional discrimination claim could be maintained for judicial elections under the Fourteenth and Fifteenth

⁴ On its own the district court ordered that elections be non-partisan even though Texas law is to the contrary. Neither party had requested non-partisan elections. The issue is not before this Court. If necessary, it may be considered on remand.

Amendments to the United States Constitution, and even though Section 5 of the Voting Rights Act applies to judicial elections, and even though some elements of Section 2 apply to judicial elections, the amended Section 2 of the Voting Rights Act which incorporates a "results test" does not allow a vote dilution claim against a judicial election system, regardless of how discriminatory it may be.⁵ Their result was based upon their interpretation of the word "representatives" which was utilized in the 1982 amendment to Section 2. The full court specifically overruled the circuit's prior opinion to the contrary, *Chisom v. Edwards*, 839 F. 2d 1056 (5th Cir. 1988), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988).⁶

One concurring opinion, written by Judge Higginbotham, 914 F. 2d 634-651, (Pet. App., at pp. 47a-114a), followed the panel opinion in *LULAC* and said that although Section 2 of the Voting Rights Act covers elections for appellate judges, it does not cover elections for trial judges.

The dissent, written by J. Johnson, (Pet. App., at pp. 115a-182a), author of the *Chisom* opinion, strongly urged that all sections of the Voting Rights Act apply to all

⁵ The findings of the district court, (Appendix, at pp. 183a-304a), unaddressed on appeal, establish that minority voters in the targeted Texas counties are unable to elect judges of their choice.

⁶ *Chisom v. Roemer*, as the case is now called, is also before this Court on Writ of Certiorari, No. 90-797. *Chisom* involves the Louisiana Supreme Court. *LULAC* involves Texas trial judges.

elected officials, including judges, and stressed the need to remedy the minority vote dilution proved at trial. The dissent characterized the majority opinion as "dangerous" and a "burning scar on the flesh of the Voting Rights Act." (Pet. App., at p. 116a.)

Statement of Facts

Judicial districts are created by statute. District judges are elected in the challenged areas in partisan elections, but each judicial candidate must file for a specific position designated by a numbered post. Each of the challenged judicial districts is countywide, with the exception of the 72nd Judicial District, which covers two counties.⁷

Qualifications for office are set by the Texas Constitution. *Texas Const.*, Art. 5, Sec. 7. To become the party nominee for a numbered judicial post, a candidate must receive a majority of the votes cast, *Texas Elec. Code*, Sec. 172.003; however, in the general election, a plurality determines the winner. *Texas Elec. Code*, Sec. 2.001. A district judge's term is four years, and the terms are staggered in multi-judge counties.

Although a district judge usually sits in the county from which he or she is elected, jurisdiction of any district court is statewide. *Nipper v. U-Haul Co.*, 516 S.W.2d 467, 470 (Tex. Civ. App. 1974). A system of "visiting judges," authorized by statute, allows retired judges to

⁷ The Texas Constitution allows judicial districts to be smaller than a county if authorized by a majority of the voters in the county. *Texas Const.*, Art. 5, Sec. 7a(i).

fill-in for elected judges when docket conditions require. *Texas Government Code*, Ch. 75.101. Aspects of any particular case may be heard by any other judge depending upon the docketing system in use.

Venue is determined by a complex set of statutes. *Texas Civil Practice & Remedies Code*, Ch. 15.

Minority electoral success has been minimal. The district court's findings detail the difficulty minority voters have electing candidates of choice in each of the challenged judicial districts. (Pet. App., at pp. 279a-281a.) Harris County provides a typical example. Even though the population is nearly 20% black, only 3 of the 59 district court judges are black. Because of racially polarized voting in the majority white countywide election district, black candidates have won only two of seventeen contested judicial elections against white candidates. (Pet. App., at p. 279a.) In a few counties, no minority has ever run because the at-large election system made "chance of success so slim." (Pet. App., at pp. 279a-280a.)

SUMMARY OF THE ARGUMENT

The *en banc* decision of the Fifth Circuit conflicts with decisions of this Court in *Haith v. Martin*, 618 F. 2d 410 (E. D. N. C. 1985), *aff'd mem.*, 477 U. S. 901 (1986), and *Brooks v. Georgia State Board of Elections*, (S. D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990). These recent decisions establish that Section 5 of the Voting Rights Act applies to judicial elections. The circuit majority attempts to distinguish between Section 5 and Section 2 coverage by a

restrictive interpretation of the word "representatives" in the amended Voting Rights Act to exclude the judiciary.

The legislative history of the act refers to judicial elections and does not specifically exclude them. In addition, the words "representatives," "candidate," and "elected officials" are used interchangeably throughout the history. Section 5 of the Act admittedly applies to judicial elections. The very terms of both Sections 2 and 5 of the Act proscribe "any voting qualification or prerequisite to voting, or standard, practice, or procedure" which results in discrimination. Coverage of the two sections is the same. In addition, "voting" is defined as being "with respect to candidates for public . . . office . . ." Judges are certainly candidates for public office.

The Attorney General has consistently interpreted the Voting Rights Act as applicable to all judicial elections.

The *en banc* majority argues that vote dilution cases are based upon the one-person, one-vote principle, and that since this principle does not apply to the judiciary, then there is no basis for a vote dilution claim. This argument confuses quantitative and qualitative vote dilution claims. Even the reasoning of the majority is flawed since they acknowledge that a constitutional claim of vote dilution may lie against a judicial election scheme. The Voting Rights Act is intended to eliminate racial discrimination in voting without regard to numerical equality.

The concurrence written by J. Higginbotham is no less dangerous to the elimination of racial discrimination in voting. They create out of whole cloth a "single-office holder" exception to coverage of the Voting Rights Act.

Based upon a misreading of *Butts v. City of New York*, 779 F. 2d 141 (2d Cir. 1985), they would hold that a trial judge is a sole decision maker and therefore his office is not subject to being subdivided. They err in that the focus of the Voting Rights Act is upon the voter, not upon the function of the elected official. The proper determination of a single-office is based upon geography, not function. If there is only one sheriff in the county, for example, then that office cannot be subdivided. Even if one accepted the existence of a single-office holder exception, it does not apply to the Texas trial judiciary since many judges are elected from any one county: 59 in Harris County. The jurisdiction of any district court is statewide. All district judges in Texas have identical powers and they often sit for each other on the same case.

By focusing upon the function of the judicial office, the concurrence has placed remedy considerations as a bar to liability. A proper analysis under *Thornburg v. Gingles*, 478 U. S. 30 (1986) requires a threshold analysis, followed by a consideration of the "totality of the circumstances" to determine if minority voting strength is being diluted. The concurrence argues that the state's interest in at-large elections and responsiveness, minor factors in a dilution analysis, outweigh eliminating any proved minority vote dilution of the electoral system.

The effect of both the majority and concurring opinion is to frustrate the purposes of the Voting Rights Act to rid the country of discrimination in voting.

ARGUMENT

I.

Section 2 of the Voting Rights Act Covers Judicial Elections

1. Supreme Court Interpretation: Section 5 and Section 2.

Despite its contention to the contrary, the *en banc* decision of the Fifth Circuit conflicts with the decisions of this Court in *Haith v. Martin*, 618 F. 2d 410 (E. D. N. C. 1985), *aff'd mem.*, 477 U. S. 901, 106 S. Ct. 3268, 91 L. Ed. 2d 559 (1986), and most recently, *Brooks v. Georgia State Board of Elections*, Civ. No. 288-146 (S. D. Ga. 1989), *aff'd mem.*, 111 S. Ct. 288 (1990). Both decisions hold that Section 5 of the Voting Rights Act applies to judicial elections.

The majority opinion of the *en banc* Fifth Circuit does not dispute the *Haith* decision. Also it asserts that some portions of Section 2 may apply to the judiciary. Nevertheless, it holds that the "results test introduced in response to the holding in *Bolden* to govern vote dilution in the election of 'representatives,' . . . by its own terms does not" apply to the judiciary. 914 F. 2d at 629. (Pet. App., at p. 29a.) As pointed out by both Judge Higginbotham's concurrence, 914 F. 2d at 638-642, (Pet. App., at pp. 62a-79a), and Judge Johnson's dissent, 914 F. 2d at 655-659, (Pet. App., at pp. 129a-140a), the majority constricts the coverage of Section 2 by placing an unwarranted restriction upon the word "representatives." This reading disregards the purposes of the Voting Rights Act.

This Court affirmed the holding in *Haith v. Martin*, 618 F. Supp at 413, that " . . . the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." (Emphasis in original.)

If the Fifth Circuit's decision is not reversed, then changes in judicial election procedures could be prohibited under Section 5, but those identical practices could not be eliminated under Section 2. Such an anomaly cannot be within the firm intent of Congress that the Voting Rights Act of 1965 "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U. S. 301, 315 (1966).

Haith and *Brooks* hold that Section 5 of the Voting Rights Act applies to judicial elections. The proscribed practices covered by Section 2 and Section 5 are the same: any "voting qualification or prerequisite to voting, or standard, practice, or procedure" Given the identical language in Sections 2 and 5, basic tenets of statutory construction require that the sections be given identical meaning. *Pampanga Mills v. Trinidad*, 279 U. S. 211, 217-218 (1929); *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433 (1932).

The two sections of the Act work in tandem. The distinction between them relates to whether a voting practice may be continued or may be implemented, not to their application to various election systems. Congress specifically stated, *House Report No. 97-227*, at 28, that

. . . under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i. e., litigation or preclearance. The lawfulness of such a practice should not vary depending upon when it was adopted, i. e., whether it is a change.

The legislative history of the 1982 amendments to the Voting Rights Act specifically stated that any voting practice subject to Section 5 would also be subject to Section 2.⁸ To draw a distinction in coverage between Section 2 and 5 is to seek a distinction in the legislative history that does not exist.

2. Language of the Act and Legislative Intent.

In addition to ignoring this Court's interpretation of the Voting Rights Act, the action of the Fifth Circuit is contrary to the will of Congress, as expressed in the legislative history and reaffirmed by this Court, that the Act have the "broadest possible scope." *Allen v. State Board of Elections*, 393 U. S. 544, 566-567 (1969).

The very words of the Act require that judicial election schemes be included within its reach. Section 14(c)(1) defines "voting" and described the practices that are included within the realm of the Act:

The terms "vote" and "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

⁸ The United States Attorney General's implementation of Section 5 now incorporates Section 2 standards. 28 CFR 51.55(b)(2).

Judges in Texas are indisputably "candidates for public . . . office." The Fifth Circuit's conclusion that the word "representatives" was intended to exclude judges is inconsistent with a reading of the Act as a whole and with its purposes. As Judge Johnson pointed out in his dissent, the Fifth Circuit majority reaches an "absurd and inconsistent result." 914 F. 2d at 654, (Pet. App., at 123a.) Discrimination would be prohibited in all elections, *except judicial elections*.

In 1982, Congress amended and strengthened the Act in response to this Court's decision in *Mobile v. Bolden*, 446 U. S. 55 (1980), which required a finding of discriminatory intent to prove a vote dilution case. It is inconceivable that Congress, while trying to strengthen Section 2, would at the same time have excluded from its reach an entire category of elections without someone saying so in the extensive legislative debates, the committee hearings, or the committee reports. No one did.

Given the references in the 1982 legislative history to judges, it is difficult to believe that Congress intended to exclude judges from the coverage of the amended Section 2.⁹ Basic to an understanding of the purpose and scope of

⁹ *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1745, 1839, 2647 (1981); *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 669, 748, 788-789 (1982).

the Act is its focus upon the *voter*, not the *elected official*.¹⁰ "The Act is, after all, the *Voting Rights Act*." J. Johnson, dissenting. 914 F. 2d 655, (Pet. App., at 128a.)

3. Interpretation by the Attorney General.

As this Court noted in *United States v. Sheffield Board of Commissioners*, 435 U. S. 110, 131 (1978), interpretation of the Voting Rights Act by the Attorney General is compelling evidence of the Act's meaning, "especially in light of the extensive role the Attorney General played in drafting the statute and in explaining its operation to Congress."

At the request of the Fifth Circuit, the present Attorney General filed an *amicus* brief before the *en banc* Fifth Circuit that said the following: "[T]he United States has consistently interpreted the coverage language of Section 2 and the almost identical language in Section 5 to apply to the election of all judges" Supplemental Brief for the United States as *Amicus Curiae*, filed June 1990, in 90-8014, *LULAC, et al. v. Mattox, et al.*

Contrary to *Sheffield*, the *en banc* Fifth Circuit dismissed the view of the Attorney General that Section 2 of the Voting Rights Act covers judicial elections. With no analysis, the majority characterized the Attorney General's opinion as one of a "scatter of birdshot contentions," 914 F. 2d at 630. (Pet. App., at p. 30a.) The Sixth Circuit, however, accorded due recognition to the view of

¹⁰ Although not concerned with judicial elections, the Eleventh Circuit agrees that "[n]owhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 [of the Voting Rights Act] on the function performed by an election official." *Dillard v. Crenshaw County*, 831 F. 2d 246, 250 (11th Cir. 1987).

the Attorney General that Section 2 of the Voting Rights Act applies to judicial elections. *Mallory v. Eyrich*, 839 F. 2d 275, 281 (6th Cir. 1988).

4. Irrelevance of the Non-Applicability of the One-Person, One-Vote Rule.

The *en banc* Fifth Circuit cited reapportionment cases that held that one-person, one-vote rules do not apply to the judiciary, 914 F. 2d at 626, n. 9. (Pet. App., at pp. 16a-17a), relying upon *Wells v. Edwards*, 347 F. Supp. 443 (M. D. La. 1972), *aff'd*. 409 U. S. 1059 (1973). Those cases dealt with malapportionment based upon population, and did not construe the Voting Rights Act. Whatever distinction that can be drawn between the judicial and legislative branch for numerical reapportionment, no such distinction can be attributed to the coverage of the Voting Rights Act. Even the Fifth Circuit conceded that prior to its amendment in 1982, the Voting Rights Act applied to the judiciary. (Pet. App., at 12a.)

The correct interpretation is by the Sixth Circuit in *Mallory, supra*: the Voting Rights Act is intended to remedy all discrimination in voting, and the 1982 amendments were intended to expand the Act, not restrict it. That Court relied upon the definition of "voting" in the Act itself, 42 U. S. C. 1973 l (c)(1). As a result the court determined that judges were "candidates for public . . . office," and, therefore, the system under which they are elected is subject to a dilution claim under the Voting Rights Act. As this Court has held, the legislative history is the authoritative source for ascertaining Congress' intent in amending the Voting Rights Act, *Thornburg v. Gingles*, 478 U. S. at 43, n. 7. In accord, the Sixth

Circuit noted that the terms "representatives," "candidates," and "elected officials" are used interchangeably throughout the text of the Senate Judiciary Committee Report.¹¹ As a result, the Sixth Circuit determined that "there is no basis in the language or legislative history of the 1982 amendment to support a holding that use of the word 'representative' was intended to remove judicial elections from the operation of the Act," *Mallory v. Eyrich*, 839 F. 2d at 278-281.

The Sixth Circuit specifically rejected the analysis later employed by the Fifth Circuit. The Sixth Circuit found that one-person, one-vote principles address an equal protection problem under the Fourteenth Amendment, whereas analysis of a Section 2 claim involves the construction of an act of Congress outlawing racial discrimination in voting. *Mallory v. Eyrich*, 839 F. 2d at 277-278.

The majority of the Fifth Circuit held that vote dilution claims were based upon one-person, one-vote principles, and therefore, if the former did not apply to the judiciary, then neither could the latter. 914 F. 2d at

¹¹ a. *Senate Report No. 417*, at 16: "elected officials;"

b. *Ibid.*, at p. 28: "Section 2 protects the right of minorities to elect candidates of their choice;"

c. *Ibid.*, at p. 30: "opportunity to . . . elect candidates of their choice;"

d. *Ibid.*, at p. 31: ". . . elect candidates of their choice;"

e. *Ibid.*, at p. 67: ". . . elect candidates of their choice;"

f. *Ibid.*, at p. 193: Additional Views of Senator Dole: ". . . equal choice of electing candidates of their choice."

627-628. (Pet. App., at pp. 20a-24a.) However, the concurrence argued that vote dilution cases against the judiciary are not precluded by one-person, one-vote principles. It reasoned that racial and non-racial acts by the state that deny voting strength are not legally the same: one is facially neutral in the matter of race and the other rests on the need to prevent the submergence of the voting strength of minorities by the combined force of bigotry and election methods. 914 F. 2d at 643. Higginbotham, concurring. (Pet. App., at pp. 80a-82a.)

The inconsistency of the majority in the Fifth Circuit is illustrated by its recognition that Constitutional claims of dilution in judicial elections are still valid. As early as 1980, the Fifth Circuit held that a constitutional challenge based on racial discrimination may be alleged against the election scheme of city and state judges in Baton Rouge. *Voter Information Project v. City of Baton Rouge*, 612 F. 2d 208 (5th Cir. 1980). Plaintiffs had sued claiming that the at-large scheme for electing city judges and state judges diluted the voting strength of black voters in violation of the Constitution. In reversing a summary dismissal under Rule 12(b)(6), Judge Brown wrote that the fact that a dilution claim involved judges made the claim no less important and no less deserving of constitutional protection. If the one-person, one-vote principle is the basis of minority vote dilution claims, then logic requires that it be the basis of both statutory and constitutional claims. In addition, while the one-person, one-vote rule does not apply to elections for water storage districts, *Salyer Land Co. v. Tulare Lake Dist.*, 410 U. S. 719, 722 (1973), and constitutional conventions, *Driskell v. Edwards*, 413 F.

Supp 974 (W. D. La. 1976), *aff'd.*, 425 U. S. 956 (1976), minority vote dilution claims have been brought to prevent racial discrimination in the elections of members of those bodies. *Leal v. San Antonio River Authority*, CA No. SA-85-CA-2988, (W. D. Tex. 1985)

5. Summary.

By ignoring the teachings of *Haith* and now *Brooks*, the intent of Congress, and the interpretation of the Attorney General, the Fifth Circuit's *en banc* ruling carves out an exception to the coverage of the Voting Rights Act that will deny thousands of minority voters an equal opportunity to vote for judges of their choice in an election system free of discriminatory elements. If the decision of the Fifth Circuit is allowed to stand, then the law will be that discrimination in voting will not be tolerated, *except in the election of judges.*

The majority opinion has ignored the true meaning of the Voting Rights Act. The struggles for the vote, and for the effective vote, have been long and bloody. There is no legal reason to read the Act to prevent minority voters from casting effective ballots for judges of their choice. If the efforts that resulted in the adoption of the Fifteenth Amendment and the host of Civil Rights Acts are not to be halted, then the majority opinion must be reversed. This Court is called upon to correct such a blatant denial of minority voting rights and to effect the will of Congress that the nation's electoral systems be free of discrimination.

II.

Section 2 of the Voting Rights Act Covers Elections for All Judges, Not Just Appellate Judges

Although the majority of the Fifth Circuit held that Section 2 of the Voting Rights Act does not apply to judicial elections, the concurrence of Judge Higginbotham makes only a slightly less damaging attack upon the Act. This position cannot be accepted as a compromise between coverage and non-coverage.

The concurrence, 914 F. 2d. at 634-651, (Pet. App., at pp. 47a-114a), would hold that the election of Texas trial judges cannot violate Sec. 2 of the Voting Rights Act, 42 U. S. C. 1973, because these judges hold single-member offices. It defined a single member office as one in which the "full authority of that office is exercised exclusively by one individual." (Pet. App., at p. 102a).

The holding is wrong for several reasons.

- The applicability of the Voting Rights Act is not determined by the nature or function of the office to which persons may be elected.
- The holding failed to follow the analysis of *Thornburg v. Gingles*, 478 U. S. 30, (1986), which requires a consideration of the "totality of the circumstances."
- The holding erroneously elevated two of the minor "Senate factors," responsiveness and tenuous state policy, to a threshold level.
- The holding confuses remedy considerations with liability considerations.

1. Nature and Function of the Office.

The concurrence recognized the wisdom of the earlier panel decision in *Chisom* which held that Section 2 of the Voting Rights Act applies to judicial elections. 914 F. 2d at 645, (Pet. App., at 90a). In the face of a challenge that judges are not "representatives," Judge Johnson, writing for the panel in *Chisom*, 839 F. 2d at 1060, quoted with approval the holding of the Eleventh Circuit in *Dillard v. Crenshaw County*, 831 F. 2d 246, 250 (11th Cir. 1987):

Nowhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official.

While acknowledging that the legislative history to the 1982 amendments to Section 2 specifically refers to "judicial districts" 914 F. 2d at 639, (Pet. App., at 59a-68a), the concurrence creates an exception for trial judges out of whole cloth by holding that trial judges occupy single-member offices that are not divisible for purposes of the Voting Rights Act.¹² The opinion refutes the notion that judicial elections are to be excluded from coverage, and then proceeds to take a course that leads to that exact result for trial judges. The opinion bases this exception on

¹² Judge Johnson in his dissent to the original panel decision, *LULAC v. Clements*, 902 F. 2d. 293, 313, note 11, demonstrates that the reasoning of the concurrence is flawed. The concurrence attempts to avoid the holding of *Haith v. Martin*, 618 F. Supp 410 (E. D. N. C. 1985) *aff'd. mem.*, 477 U. S. 901, 106 S. Ct. 3268 (1986) by alleging a distinction between Section 2 and Section 5 of the Voting Rights Act, while elsewhere discounting such a distinction.

language in *Butts v. City of New York*, 779 F. 2d 141 (2d Cir. 1985), which held that a single-member office, such as a mayor, comptroller, or council president, cannot be further divided. The single-member offices in *Butts*, however, were singular within a geographic area. For example, there is only one mayor for the City of New York. The argument of the concurrence is that the hallmark of a single-member office is the fact that the full authority of the office is exercised exclusively by one individual. (Pet. App., at 102a). By emphasizing decision making authority rather than a single office within a geographic area, the concurrence mischaracterized trial judges in Texas as single-member office holders. The error is obvious. For example, in Harris County there are 59 judges with exactly the same authority.¹³

In addition, *Butts* was decided incorrectly.¹⁴ At issue there was whether the 40% majority run-off requirement for mayor, comptroller, and city council president, all single-member offices, violated Section 2 of the Voting Rights Act. *Butts* at 148-149. Even though the majority there stated "[w]e need not determine whether such opportunity could ever be denied in the context of an

¹³ The offices of trial judges in Texas are fungible. All have exactly the same authority. *Texas Constitution*, Art. 5. Sec. 8; *Tex. Govt. Code* Sec. 24.007.

¹⁴ A panel of the Eighth Circuit agreed with the dissent in *Butts*. *Whitfield v. Democratic Party of the State of Arkansas*, 890 F. 2d 1423, 1432, footnote 3 (8th Cir. 1989), vacated and decision of district court to the contrary aff'd by equally divided court, *en banc*, 902 F. 2d. 15 (8th Cir. 1990), *cert. denied*, No. 90-383. It is significant that both *Whitfield* and *Carrollton Branch of NAACP v. Stallings*, 829 F. 2d 1547 (11th Cir. 1987), which correctly consider the intent of Section 2, are post-Gingles decisions, while *Butts* is pre-Gingles.

election to a single-member office," the decision erred by failing to take into account the intent of the Voting Rights Act: to protect or prevent impairment of the right of minorities to cast an undiluted vote for the candidate of their choice without regard to the office being voted upon. Fashioning a single-member office exception was not necessary to a decision. In *Butts*, the issue was the effect of the run-off requirement, not the nature of the office to which it was applied. As pointed out by the dissent there, various devices can inhibit participation, one of which could be a run-off requirement. While no share of a geographic single-member office may be possible, minorities do "have a right not to be subject to any structural process that deprives them of equal opportunity to field a candidate for one of those offices." *Butts*, 779 F. 2d at 155.

Even if *Butts* was correctly decided, it is not applicable here. The distinction has been extensively analyzed and rebutted by the trial court in *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518-520 (M. D. Ala, N. D. 1989). The underpinning of the decision is capsulized in footnote 19:

The true hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller. While mayors and sheriffs do indeed "hold single-person offices in Alabama," they do so because there is only one such position for the entire geographic areas in which they run for election. . . . [W]hat is important is how many positions there are in the voting jurisdiction. It is irrelevant, in ascertaining the potential existence of vote-dilution,

that these officials happen to exercise the full authority of their offices alone.

The rationale of the *Butts* exception is that a single-member district cannot be shared, or stated otherwise, no remedy is possible.¹⁵ Judge Dubina recognized in *S.C.L.C.* that in these multi-judge districts "splitting the jurisdiction into two or more districts is not only possible, but can 'secure [to a minority class] a share of representation equal to that of other classes.' *Butts*, 779 F. 2d at 148." *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. at 519, n. 24. These types of judicial offices have been correctly characterized as "designated seats in multi-member districts." *Haith v. Martin*, 618 F. Supp 410 (D. C. N. C. 1985), *aff'd mem.* 106 S. Ct. 3268 (1986). *Haith* was correct. *Butts* does not apply.

Moreover, trial judges in Texas do not act alone in fulfilling their judicial duties. Not only do they regularly substitute for each other, there is a system of "visiting judges" which allows retired judges to hear aspects of any particular case. And as admitted by the concurrence, 914 F. 2d 647, (Pet. App., at 96a-98a), judges act together in many rule making and administrative activities. These activities are a part of a judge's duty. There is no ability under state law to separate them, and, likewise, no reason under the Voting Rights Act for them to be separated,

¹⁵ *United States v. Dallas County Commission*, 850 F. 2d 1430, 1432, note 1, is of no help to the concurrence. In that case there was only one probate judge in Dallas County. Plaintiffs did not challenge any county exclusively served by only one court.

with some counting and some not counting in a liability determination under Section 2.¹⁶

2. Gingles Analysis.

The concurrence failed to follow this Court's analytical framework for evaluating vote dilution claims. *Thornburg v. Gingles*, 478 U. S. at 50-51. The basis of a Section 2 claim is that certain electoral characteristics interact with social and historical conditions to create an inequality in the minority and majority voters' ability to elect their preferred candidates. Review of all Senate factors is relevant, but most important is a finding of racially polarized voting and lack of minority electoral success. *Id.*, at 48, note 15.

3. Over Emphasis of Minor "Senate Factors".

The concurrence has seized upon two relatively minor issues, tenuous state policy and responsiveness, as underpinnings of its analysis. In so doing, the concurrence incorrectly elevated "the additional factors" of the listed Senate factors, *Senate Report*, at 206-207, to a threshold status ahead of the three *Gingles* factors and the "totality of the circumstances."

The Senate factors, other than polarized voting and extent of the election of minority officials, have been held

¹⁶ Both *Westwego Citizens for Better Government v. City of Westwego*, 872 F. 2d 1201 (5th Cir. 1989) and *Dillard v. Crenshaw County, Alabama*, 831 F. 2d 246 (11th Cir. 1987) refused to allow the various functions of the officials at issue to be separated out for purposes of a liability determination under Section 2.

to be supportive of but not essential to a plaintiff's vote dilution claim. *Gingles* at 48, note 15.

a. State's Interest in At-large Elections.

The concurrence argues that the state's interest in its structural arrangement of election of judges¹⁷ by definition prevents voter dilution claims even when judges are elected at-large in majority white counties. 914 F. 2d at 651, (Pet. App., at 112a-114a). This foreclosing conclusion is reached without any consideration of the "totality of the circumstances" as mandated by *Gingles*.

Whether or not the state has a compelling interest in at-large elections for trial judges should be considered as a part of the totality of circumstances analysis under the rubric of whether the state's interest is tenuous. *Senate Report*, at 206-207, states:

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The district court found as a part of its "totality" analysis that there was no compelling state interest in the current at-large scheme. (Pet. App., at p. 283a.)

There is substantial doubt that the State of Texas has *any interest* in continuing at-large judicial elections by

¹⁷ The concurrence's statement that "[w]e are persuaded that Texas has a compelling interest in linking jurisdiction and elective bases for judges acting alone" is factually inaccurate. As demonstrated below, jurisdiction is statewide and elective base is countywide.

county. The state constitution specifically allows creation of judicial districts smaller than a county. *Tex. Const.* Art. V, Sec. 7a. The district courts exercise jurisdiction statewide, *Nipper v. U-Haul Co.*, 516 S. W. 2d 467 (Tex. Civ. App. 1974), although the judges are elected from a sub-district of the state, which historically has been the county or counties. Justice of the Peace courts are elected from sub-districts within a county, but have countywide jurisdiction. *Tex. Const.* Art. V, Sec. 18 & 19. *Tex. Govt. Code*, Sec. 37.031, Jurisdiction.

b. Responsiveness.

Additionally, in recasting the interest of minority voters and minority litigants in terms of having their policy interests reflected in judicial decisions rather than in terms of removing impediments to the minority voters' right to cast an effective vote, the concurrence has improperly elevated the other additional factor, "responsiveness," to a threshold level, rather than relegating it to its proper level. "Unresponsiveness" is no longer a necessary part of a plaintiff's case. *Rogers v. Lodge*, 458 U. S. 613, note 9 (1982); Congress has expressly disapproved excessive reliance on responsiveness. *Senate Report*, at 207, note 116.

Finally, the suggestion that "judges must be 'accountable' to litigants is an affront to the Texas judiciary." 914 F. 2d at 667, Johnson, dissenting. (Pet. App., at p. 170a.)

4. Confusion of Remedy and Liability Considerations.

The question of whether district judge offices can be sub-districted based on their supposed "sole decision

making authority" is not a basis for denying Section 2 liability. The question of sub-districting relates to remedy. When a state adopts a remedy, it may consider sub-districting along with other remedial possibilities that will satisfy the concerns Judge Higginbotham has about any state interests in keeping electoral base tied to a judge's normal area:

- Elimination of majority vote requirements
- Elimination of numbered posts
- Elimination of anti-single shot requirements
- Limited voting
- Cumulative voting
- Smaller than single county districts, with judges normally hearing cases only from those districts (yet being able to help out with overload from adjoining districts).

As stated by Judge Johnson in his dissent, 914 F. 2d at 669, note 33, (Pet. App., at p. 175a, note 33):

Once again, the concurrence's asserted concern is premised on the anticipated remedy - subdistricting. While the Supreme Court, in *Gingles*, did indicate that a "single-member district is generally the appropriate standard against which to measure minority group potential to elect," it did not mandate the imposition of sub-districts to remedy every instance of illegal vote dilution. The concurrence, by erroneously factoring in, at the liability phase, concerns which may never be borne out, refuses to properly acknowledge the intent of the Voting Rights Act.

5. Summary.

In summary, Congress has expressed its intent to eradicate all discriminatory electoral devices. The concurrence has focused upon the function of the elected official and the duties and powers of the judicial office. It has disregarded the analysis under the *Gingles* factors. It has misused the minor "Senate factors," and has confused remedy and liability considerations. This flawed analysis resulted in a conclusion that there is "sole-decision maker" exception to claims of minority vote dilution in majority white, at-large election schemes. To approve this exception would frustrate the intent of the Voting Rights Act.

CONCLUSION

For the above reasons, this Court should reverse the *en banc* decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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February 25, 1991

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether Congress included district judges within Section 2(b) of the Voting Rights Act when it extended Section 2 to add a results test for vote dilution?

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Nos. 90-813 and 90-974

In the Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASS'N, *et al.*, and
LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
PETITIONERS,

v.

THE ATTORNEY GENERAL OF TEXAS and
JUDGE F. HAROLD ENTZ, *et al.*,
RESPONDENTS.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR RESPONDENT
JUDGE F. HAROLD ENTZ**

STATUTE INVOLVED

Section 2 of the Voting Rights Act, as amended,
provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1988) (emphasis in original).

STATEMENT OF FACTS

Respondent Judge Entz is a sitting criminal district judge in Dallas County, Texas. He intervened as a defendant partly to present an independent factual defense of Dallas County.¹ Although this case was resolved below on legal issues largely independent of the facts, Petitioners have presented such a misleading view of the facts as they pertain to Dallas that Judge Entz must respond.

Dallas County is a large metropolitan area encompassing the seventh largest city in the U.S. (Dallas), and several medium-sized cities (Garland, Irving, Mesquite,

¹Judge Entz also presented legal arguments not raised by the Attorney General, including the plain meaning and constitutional arguments briefed here.

Richardson and others). (DI-Dallas Ex. 2)² Dallas County has a sophisticated system of judicial administration to handle the problems that arise in a major metropolitan county. (Tr. 4:144) Its thirty-seven district courts are divided into four specialized groups with principal responsibility for criminal, civil, family, and juvenile matters. (DI-Dallas Ex. 22) Although each court operates as an autonomous judicial entity, central administration of case docketing and jury selection from venire persons within the county provides for the quick and efficient administration of justice in Dallas County. (See Summary of Deposition of Hon. John McClellan Marshall, DI-Dallas Ex. 24)

District judges in Dallas County run for and are elected to the bench of a particular, specialized district court. (Tr. 5:81) Each court hears its own docket and decides its own cases; there is no collegial decisionmaking by any collective body of district judges. (*Id.*) Thus, each court is effectively a single-person elected position. In accordance with the long tradition in the State of Texas of the county being the fundamental unit of state government at the local level, each judge is elected county-wide and has primary jurisdiction county-wide. (Tr. 4:138) This decades-old system ensures that no particular single interest group in a diverse county can exercise undue influence over any particular judge, that all judges will have a county-wide perspective to match their county-wide jurisdiction, and that all voters in the county can

²All of Judge Entz's exhibits (noted "DI-Dallas Ex. x") were offered and admitted as a group. Tr. 4:72-74.

participate in the election of all judges with primary jurisdiction over the county.

Until recently, Dallas County was a one-party Democratic county. (Tr. 4:98) Beginning in about 1978, however, Dallas County government underwent a Republican revolution. The Dallas County bench in a short ten years transformed from completely Democratic to almost completely Republican. (Tr. 4:99; DI-Dallas Exs. 4A-8A) The simple fact in Dallas County judicial politics today is that only an anomalous Democratic candidate can be elected as a district judge.³ Conversely, candidates who run as Republicans *will* get elected.⁴

This overwhelming trend to Republican judges is completely color-blind. Black Republican candidates have defeated white Democratic incumbents, and white Republican challengers have defeated highly qualified black Democratic incumbents who had virtually every conceivable endorsement.⁵

³The *only* elected Democratic district judge in Dallas County is named Ron Chapman. Another Ron Chapman (of the Dallas based radio station KVIL) is the host of the top-ranked morning radio show in the Dallas area. (Tr. 4:101)

⁴This situation is true without regard to race, recommendation of the local Committee for a Qualified Judiciary, results of the local Bar poll, money spent in campaigning, and/or incumbency. All of the evidence from both sides is consistent on this point.

⁵For example, Jesse Oliver, a black Democrat, was a former state representative from a predominantly minority area of Dallas. He was appointed to the district bench following a relatively high-visibility state senate campaign. In running for reelection he received the endorsements of virtually all groups that offer endorsements -- both major Dallas newspapers, the Committee for a Qualified Judiciary (a non-partisan group), the local bar poll, and numerous civic groups. Although these endorsements contributed to his being one of the highest polling
(continued on next page)

Of the nine contested primary and general district judge elections with a black candidate, the black Republican candidates won all four of the races in which they campaigned and the black Democratic candidates lost all five of the races in which they campaigned. (Tr. 4:106, DI-Dallas Ex. 9A) Dallas County voters are generally unaware of the name, office, or racial background of judicial candidates.⁶

Black Democratic judicial candidates fare equally as well as white Democratic judicial candidates, and typically do better than the top of the Democratic ticket (DI-Dallas Ex. 9A); one black Republican judicial candidate, Judge Carolyn Wright, led the ticket of all Republican candidates in Dallas County. (Tr. 4:213) Even Petitioners' expert Richard Engstrom candidly admitted that the evidence established that party affiliation rather than race is the best indicator of both the election results and which candidate would receive the support of the minority community. (Tr. 2:147-49) *Expert witnesses for both sides of the case and most of the losing black Democratic judicial candidates agreed that the losing black Democratic judicial candidates would have won had they run as*

(continued from previous page)

Democratic candidates in Dallas County, he still lost in the Bush-led Republican sweep of Dallas County. (Tr. 2:244; 2:247-52)

⁶See DI-Dallas Ex. 11. This exhibit is a survey of voter awareness of Dallas County judges. The survey indicated that the vast majority of voters of all races were wholly unaware of the identity of Dallas County judges, much less the race of those judges. Amazingly, even when told that persons named in the survey were elected public officials, most respondents identified Ron Chapman as a radio disk jockey. Charts summarizing the survey data are found at DI-Dallas Exs. 12-14. See also Tr. 4:104-23 (testimony of Dr. Champagne regarding survey).

Republicans — as they were all invited to do. (Tr. 2:188; 5:283-84) Black judicial candidates of both parties are faring neither better nor worse because of their race. Judicial candidates in Dallas County win or lose due to their partisan affiliation, not their race.⁷

The District Court ignored the political and practical reality and based its conclusions on the reality-blinding excursion of bivariate ecological regression analysis.⁸ (November Order at 14-78) According to the 1980 Census, Dallas County was approximately 65% white, 19.7% black, and 15.3% Hispanic. (Tr. 4:130) In August, 1989, the Dallas County district bench was 91.7% white, 5.6% black, and 2.8% Hispanic. (Tr. 4:130; DI-Dallas Ex. 18A) Petitioners claimed that “underrepresentation” alone showed a violation of section 2, and used their statistical analyses to support their claims.

But the undisputed facts showed that, nationwide, the racial composition of a district bench will match the racial composition of the bar from which judicial candidates are

⁷It certainly also is true that black and white voters tend to show different voting patterns. Black Dallas County voters in judicial races tend to vote over 95% for the Democratic candidate, with a phenomenal 93% casting straight ticket votes. (Tr. 5:280) White voters tend to vote 60-70% for the Republican candidate, with a much smaller 28% straight ticket Republican vote. (Tr. 5:281; DI-Dallas Ex. 16) The amazingly high level of straight ticket voting by black voters, coupled with the relative lack of awareness or knowledge of judicial candidates, shows that even in the black community, judicial candidates get black votes not because of their race or qualification, but because of their partisan affiliation.

⁸“Bivariate ecological regression analysis” is a statistical technique that attempts to estimate voting patterns of racial groups. See *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986).

drawn, rather than the population as a whole, *regardless of what system of judicial selection was used*.⁹ The evidence showed that 2.2% of the lawyers in Dallas County are black. (Tr. 4:130) Dr. Champagne¹⁰ testified accordingly that the Dallas County judicial bench (or Texas or New York benches) would have a racial composition that paralleled the number of minorities in the pool of legally qualified candidates. The number of minority law students is increasing; as those students graduate, pass the bar, and gain experience, the percentage of minority judges inevitably will increase. (Tr. 4:136-38) The judicial election *system* that the District Court condemned had nothing to do with the percentage of minorities on the bench.

The Petitioners' case rested primarily upon the statistical type of proof discussed above; conspicuously lacking from their case was any contention or testimony that the relief sought — single member districts — would have a positive impact on the role of minorities in connection with the judicial

⁹This was based on a comprehensive study of all likely factors involved in judicial selection, including the method of selection. The study showed that nationwide by far the highest correlation and the best explanatory factor for the number of minority judges in a jurisdiction is the number of minority lawyers. (Tr. 4:130-32) That correlation holds true in Dallas County, as well as the rest of the country.

¹⁰Dr. Anthony Champagne is a professor of political science at the University of Texas at Dallas, specializing in judicial selection; he is currently serving as a United States Supreme Court Judicial Fellow. He has published widely in the field. *See, e.g.*, Champagne, *The Selection and Retention of Judges in Texas*, 40 SW. L.J. 66 (1986); Champagne, *Judicial Reform in Texas*, JUDICATURE, Oct.-Nov. 1988, at 146; *see generally* DI-Dallas Ex. 3 (Champagne vita). Dr. Champagne testified as an expert witness for Judge Entz.

system other than permitting the election of some greater number of minority judges. The most probative testimony on this point came from Judge Wright of Dallas County and Judge Sturns of Tarrant County. Both of these black Republican judges believed that single member districts would be bad for minorities in the long term. They would lead to "black" seats on the bench, with public perceptions of "black" justice and "white" justice depending on the judicial district. (Tr. 4:192-93; 5:71-72) Black jurists, as a practical matter, would be limited to their quota of seats based on the number of majority-minority districts and would be unable to run from other districts. (*Id.*) The net result over time of single member districts would be a hardening of racial attitudes, rather than a color-blind system of justice. (*Id.*) That surely is not a goal to be pursued at the expense of a system that even the District Court acknowledged "has, for the most part, served us well for many years." (November Order at 6)

SUMMARY OF ARGUMENT

Section 2(b) of the Voting Rights Act was added in 1982 in the course of amendments designed to reverse this Court's ruling in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The amendments were designed to change the proof standard from "intent" to "results," and also to add protection against vote dilution to a statute that previously protected only access to the ballot. Petitioners characterize the issue before this Court as whether an amendment that was intended only to change the standard of proof should also be read to have accidentally excluded judges from the coverage of section 2.

This position makes sense only if one ignores the second goal of the 1982 amendments, to create a new dilution remedy.

With this second goal in mind, the question before the Court, properly understood, is: When Congress added new substantive scope to section 2 with the 1982 amendments, did they include judges within that new federal remedy? The straightforward way to answer that question is to look at the text of the new statute. The dilution remedy extends only to "representatives." Judges are not "representatives." Once section 2(b)'s purpose is understood, much of Petitioners' search for legislative history dealing with "intent to create an exception to the scope of the access protection of old section 2" becomes pointless. Section 2(b) is simply different from the old section 2.

Alternatively, if judge are somehow representatives, Petitioners are still not entitled to relief because district judges in Texas are single office holders, like a governor, rather than members of multi-member bodies such as legislators. District judges do not deliberate collegially, like legislators. Thus, the underlying representative theories that permit replacing at-large legislators with single member district legislators simply do not apply in the context of a solo decisionmaker, such as a district judge.

Finally, the Court should adopt one of the two preceding theories because if the Court determines that district judges are representatives — and representatives who, like legislators, can be reapportioned without altering the fundamental nature of their office — then the Court must address serious constitutional concerns over the validity of

section 2, as applied. First, the creation of a constitutionally valid judicial system, one that comports with the numerous due process and criminal procedure constitutional requirements, would require a federal intrusion into core state sovereign activities to an extent that would violate principles of federalism and the guaranty clause. Doing this on the belief that judges are representatives and should be treated like political representatives offends notions of separation of powers. Finally, if these more specific attacks should fail, the Court must confront the question whether section 2 was constitutionally adopted in the first place.

This Court tries, when possible, to avoid consideration of constitutional issues. Here, especially when there is a viable and compelling alternative, the Court can resolve this case simply by reading the statute. Section 2(b) applies to representatives; judges are not representatives.

ARGUMENT

I. DISTRICT JUDGES ARE NOT REPRESENTATIVES AND THEREFORE WERE NOT INCLUDED WITHIN THE SCOPE OF THE EXTENSION OF SECTION 2

A. *The 1982 Amendments to Section 2 Added Both a Results Test and a Dilution Remedy*

It is widely understood that the 1982 amendments to section 2 were a congressional response to this Court's opinions in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). This is often stated in terms of a congressional attempt to replace an intent standard with a results standard in section 2.

What Petitioners completely ignore — and what is crucial for this case — is that Congress also supplemented section 2 to protect against dilution of voting rights, as well as against impairing access to the ballot.

By ignoring the second aspect of the amendment, Petitioners are able to mischaracterize the thrust of the 1982 amendments as simply altering the proof standard and thereby equating the substantive reach of the pre- and post-amendment section 2. Petitioners thus improperly transform the question before the Court to whether the 1982 amendments inadvertently excluded judges from the unquestioned coverage of the pre-amendment section 2. In fact, when the dual nature of the 1982 amendments is considered, the issue is whether the addition of new substantive coverage reached far enough to include judges. Because Petitioners' fundamentally erroneous perspective permeates their argument, Judge Entz addresses it even before considering whether judges are included in the plain meaning of "representative."

City of Mobile involved attacks under section 2, the Fifteenth Amendment, and the Fourteenth Amendment. *Id.* at 58. This Court's distinct treatment of each attack holds the key to understanding the 1982 amendments to section 2. The plurality initially ruled that section 2 was coterminous with the Fifteenth Amendment. *Id.* at 60-61 (Part II). It then addressed the Fifteenth Amendment claims and held first, that a Fifteenth Amendment claim requires a showing of discriminatory intent, *id.* at 61-63, and second, that there was no showing of any abridgment of the right to access to the ballot and therefore no Fifteenth Amendment violation: "Having found that Negroes

in Mobile 'register and vote without hindrance,' the District Court and the Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Id.* at 65. Thus, plaintiffs lost under the Fifteenth Amendment not because of the heightened standard of intent, but because they did not show any impairment of their rights to access to the ballot.¹¹ The plurality then

¹¹This view of the Fifteenth Amendment as protecting only access to the ballot is consistent with this Court's longstanding view of that Amendment's reach. Beginning in companion cases *Guinn v. United States*, 238 U.S. 347 (1915), and *Myers v. Anderson*, 238 U.S. 368 (1915), the Court outlawed the application of "grandfather clauses" that exempted from literacy tests those persons either entitled to vote prior to the passage of the Fifteenth Amendment or those who were lineal descendants of persons entitled to vote prior to such time. In both cases, passage of the literacy tests were a precondition to voting. Thus, the grandfather clauses were prohibited by the Fifteenth Amendment because they operated in conjunction with the literacy test to deny black citizens access to the polls.

Likewise, onerous procedural requirements that effectively handicapped the black franchise are prohibited by the Fifteenth Amendment. In *Lane v. Wilson*, 307 U.S. 268 (1939), the Court struck down an Oklahoma law that perpetually disenfranchised all those citizens who failed to register to vote in a short eleven day period in 1916. The exception for failure to register was for those who had voted in 1914. Of course, blacks had not voted in 1914 because they were barred from the polls by the discriminatory application of literacy tests.

In *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), the Court outlawed all-white primaries, pursuant to which blacks were prevented from voting in the controlling parties' primary, but were allowed to vote in the general election in which the victor of the all-white primary ran unopposed. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court struck down a racial gerrymander that fenced the black residential area out of the city limits, rendering them ineligible to vote in city elections. Finally, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court upheld the literacy test ban, as well as other provisions of the Voting Rights Act that attempted to protect the physical casting of ballots, as an appropriate
(continued on next page)

considered plaintiffs' dilution attack on the at-large system, but only in its discussion of equal protection under the Fourteenth Amendment. *Id.* at 65-80 (Part IV).¹²

Thus, the ruling in *City of Mobile* that section 2 was coterminous with the Fifteenth Amendment affected section 2 in two ways: (1) it restricted section 2 to intentional discrimination, and (2) it restricted section 2 to impaired access to the ballot claims under the Fifteenth Amendment, and excluded coverage for dilution claims under the Fourteenth Amendment. Congress was well aware of this second restriction on section 2 when considering the 1982 amendments and intended to alter that limitation, as well as adopt a results test:

Likewise, although the plurality [in *City of Mobile*] suggested that the Fifteenth Amendment may be limited to the right to cast a ballot and may not extend to claims of voting dilution (without explaining how, in that case, one's vote could be "abridged"), this section without question is aimed at discrimination which takes

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exercise of congressional authority to protect minority access to the polls under the Fifteenth Amendment.

¹²Again, the plurality's view that qualitative vote dilution is prohibited by the Equal Protection Clause of the Fourteenth Amendment, not by the Fifteenth Amendment, is consistent with this Court's well-established reading of the Fourteenth Amendment. See, e.g., *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). Guaranteed access is a Fifteenth Amendment protection; meaningful access springs from the Fourteenth Amendment. Hence, the Supreme Court's analysis of claims that multi-member districts were being used invidiously to cancel out or minimize the voting strength of racial groups always has been an equal protection analysis. *White v. Regester*, 412 U.S. 755, 764 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 142-44 (1971); *Fortson v. Dorsey*, *supra*, at 439.

the form of dilution, as well as outright denial of the right to register or to vote.

S. REP. No. 97-417, 97th Cong., 2d Sess. 30 n.120 (1982), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 208 n.120. See also *id.* at 25 (acknowledging plurality's reading of Fifteenth Amendment as excluding dilution claims). Congress thus based the 1982 amendments on both the Fourteenth and Fifteenth Amendments. See *id.* at 18, 27, 39.

Congress plainly drafted the 1982 amendments to section 2 to accomplish both of its remedial goals in light of *City of Mobile*. In what is now subsection (a), Congress added "results" language. Congress also added subsection (b), which created a dilution remedy in section 2. The question raised by this case, then, is whether Congress included judges within the scope of the dilution remedy it added in the 1982 amendments to section 2.

B. Judges Are Not Included in the Plain Language of Section 2(b)

In his majority opinion in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), Judge Gee analyzed the meaning of Section 2(b) of the Voting Rights Act using the plain language of the section. Judge Entz will not attempt to improve on Judge Gee's lucid demonstration that the plain meaning of "representative" does not include judges. In concluding that Congress could not have intended to include judges within the definition of "representatives," Judge Gee wrote that "[g]iven the mutual exclusiveness of the two terms, to suggest that Congress chose 'representatives' with the intent of including judges is roughly on a par with suggesting that the

term *night* may, in a given circumstance, properly be read to include *day*." *Id.* at 628-29 (emphasis in original).¹³ Ask people on the street; they will, to a person, say "judge" is different than "representative."¹⁴

Holding that judges are not representatives still provides ample protection for minority voting rights in judicial elections. First, any act that is intentionally dilutive is directly actionable under the Fourteenth Amendment. Second, any action that results in minorities having diminished access to the ballot in judicial elections is actionable under section 2(a). Thus, a plain reading of the statute provides a workable result, without resorting to the quagmire of legislative history.

Resorting to legislative history to find a gloss for the plain import of a statute can be unreliable, since it can be manipulated by any legislator who takes the time to express his or her views on the record as to what the statute means. Such statements are not ratified by Congress when it passes the bill, and, in reality, are rarely known by people who vote for the bill. "[I]t must be assumed that what the Members of the House and Senators thought they were voting for, and what

¹³Holding that judges are elected representatives, like legislators, also would make a mockery of notions of separation of powers.

¹⁴The dictionary defines "representative" as: "one that represents another or others in a special capacity. . . one that represents a constituency as a member of a legislative or other governing body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1926 (1976). The word has no peculiar legal definition: "A person chosen by the people to represent their several interests in a legislative body; e.g. representatives elected to serve in Congress from a state congressional district." BLACK'S LAW DICTIONARY 1302 (6th ed. 1990).

the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said.” *United States v. Taylor*, 487 U.S. 326, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring in part). Therefore, the legislative history is not to be considered by a court at all unless the language of the statute is so ambiguous the court is at a loss to make sense of it. The judiciary is to “interpret laws rather than reconstruct legislators’ intentions. Where the language of those laws is clear, we are not free to replace it with unenacted legislative intent.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53, (1987) (Scalia, J., concurring).

Although in years past the Supreme Court may have appeared to deviate from this doctrine at times, this Court’s more recent decisions have reaffirmed this standard. In *United States v. Monsanto*, 109 S. Ct. 2657 (1989), one party sought to persuade the Court through the use of legislative history. The Court responded: “In determining the scope of a statute we must look first to its language.” *Id.* at 2662. The Court then rejected the tender of postenactment legislators’ statements explaining congressional intent behind the statute, and stated: “As we have noted before, such postenactment views ‘form a hazardous basis for inferring the intent’ behind a statute; instead Congress’ intent is best determined by looking to the statutory language it chooses.” *Id.* at 2663 (citations omitted).

Judge Higginbotham, in his concurrence below, reached into the legislative history only after he determined that an ambiguity arose because he thought elected judges were “representatives” to the extent that electoral accountability

inherently implies some degree of representation. *LULAC*, 914 F.2d at 636. Equating accountability with representation, however, is a mistake.

Accountability deals with who hires and fires; representation deals with the function of the position, whether one person speaks and acts for another. In many instances the two concepts overlap. For example, a Member of Congress is accountable to his or her constituents and also represents those constituents. The coincidence of these two concepts, however, is not automatic. For example, prior to the Seventeenth Amendment, senators were selected by state legislators; the senators so selected nonetheless did not “represent” the state legislators, but rather the people of the state. The honorable Justices of this Court are appointed by the President and can be removed by the Senate; no one would contend, however, that the Justices “represent” either the President or the Senate.¹⁵

In short, Judge Higginbotham erred. The fact that Texas’ judges are elected in no sense creates an ambiguity regarding whether they are in some sense “representatives” of Texas voters. Absent that ambiguity, there is no basis for exploring the legislative history of section 2, either from 1965 or from 1982. “Representative” is a simple word with a

¹⁵Conversely, one can represent without being elected. “In its original conception, representation did not always require voting, as can be shown in the Declaration of Independence. The body of this document consists of a long bill of particulars against George III which would be unnecessary and misleading if representation required voting.” Mansfield, *Impartial Representation*, in REPRESENTATION AND MISREPRESENTATION 106 (R. Goldwin ed. 1968).

meaning plain enough to require no further inquiry. The Court need go no further than the face of the statute.

***C. Neither Rules of Construction Nor
Legislative Intent Can Transform
Judges into Representatives***

As discussed above, there is no need for this Court to turn to evidence of legislative intent or apply canons of statutory construction because the text of the statute itself is clear.¹⁶ Faced with the awkward fact of the statutory language, Petitioners and *amicus* the United States prefer to discuss legislative history and canons of construction. One fact apparent from the legislative history is that Congress simply did not give much consideration to the prospect that

¹⁶If the Court is inclined to apply canons of construction, Judge Entz commends the one used below by Judge Gee:

In 1982, as of the time of Congress's adoption of the Court's language from *White*, at least fifteen published opinions by federal courts . . . had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections. Not one held to the contrary. . .

. . .

. . . By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which the judicial office was not deemed a "representative" one.

LULAC, 914 F.2d at 626, 628 (citations and footnote omitted). *See also Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973) ("Judges do not represent people, they serve people."); *Hatten v. Rains*, 854 F.2d 687, 696 (5th Cir. 1988) ("Judges, even if elected, do not serve a primarily representative function.").

litigants might some day claim that judges are “representatives” subject to section 2(b). Thus, the legislative history debate turns into a procedural question: Who must “prove” Congress’ intent regarding coverage of judges?

Petitioners attempt to shift the burden and require Respondents to show that Congress intended to exclude judges. Normally a party seeking relief under a statute has the burden of showing that the statute applies. Even more to the point, as discussed above, section 2(b) was an extension of section 2 to add a dilution test. Given that context, *Petitioners* should bear the burden of showing that when Congress extended section 2 to add a dilution test, Congress intended the extension to reach judges.

In a related form of that argument, *Petitioners* urge a syllogism on the Court: (1) amended section 2 covers everything old section 2 covered; (2) old section 2 covered judges; therefore (3) new section 2 covers judges.¹⁷ The syllogism is defective because the major premise is wrong. Section 2(b) facially has diminished scope from the old section 2.

The old section 2 (and the current section 2(a)) cover all voting; section 2(b) covers only voting related to electing people. For example, old section 2 and current section 2(a) would cover a referendum or a vote on a state constitutional amendment, while section 2(b) facially does not cover those. Thus, even prior to addressing the question whether judges are

¹⁷This argument proceeds wholly independently from the statutory language, which seems an unusual method of statutory construction.

“representatives” we know that the syllogism fails — we know the scope of section 2(b) is different than the scope of old section 2 and simply must determine how *much* different.¹⁸

Finally, in an attempt to gain from the legislative silence on the subject, the United States urges this Court to draw a negative inference from the fact that Congress did not explicitly say much about judges. Brief for the United States at 32 & n.28, *Chisom v. Roemer*, Nos. 90-757 and 90-1032. Hinting that detective skills are needed to ascertain Congress’ intent, the United States relies upon the principle of “the dog that did not bark,” citing A. DOYLE, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* (1927).¹⁹ The United States should have consulted a different Holmes: “You must not alter words in the

¹⁸Viewed in this framework, Petitioners’ reliance on the broad definition of voting in section 14(c)(1) is even less pertinent, particularly given the fact that section 2(b) does not use the term. Also, by their logic, a provision that referred to “voting for dogcatcher” would apply to judges because of the broad definition of “voting.” Likewise their reliance on the scope of section 5 is pointless. The issue is not the scope of old section 2, of new section 2(a), of section 5, or of section 14(c)(1). The issue is, simply, whether judges are “representatives” under section 2(b).

¹⁹The majority opinion in the very case the United States cites specifically rejected drawing that negative inference:

[I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980).

interest of imagined intent . . .” *United States v. Riggs & Co.*, 203 U.S. 136, 27 S. Ct. 39, 40 (1906) (Holmes, J.).²⁰

II. A SECTION 2(b) ATTACK DOES NOT LIE AGAINST TEXAS’ DISTRICT COURTS BECAUSE THEY ARE SINGLE MEMBER DISTRICTS

Even if judges were to be “representatives” under the amended section 2(b), Petitioners’ dilution claim would still be flawed because district courts are already single member districts. Petitioners characterize this argument as an improper creation of a single officeholder exception out of the whole cloth. This rhetorical ploy is similar to their demand that Respondents prove that Congress intended to exclude judges from the amended section 2. Rather than being a judge-made exception to the statute, it is simply an inherent limitation in the logic of a dilution attack on an at-large position. *See Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985). Unlike Petitioners, *amicus* the United States acknowledges the truth of this observation. Brief of the United States at 12-15. Judge Entz will not reiterate the United States’ argument.

The United States errs, however, in its assessment of how one determines whether an office is a single member office. According to the United States, one simply looks around to see how many of those offices exist in a jurisdiction.

²⁰*See also LULAC*, 914 F.2d at 630 (“[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute.”) (quoting *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.)).

The United States overlooks the very logic that justifies the use of single member districts in a legislative body.

The policy underlying single member districts in a legislative context is to permit each discrete group in the larger community to have a representative who will articulate that group's needs and interests in the process of collective decision making. Through the political process, a collective decision will be reached that properly reflects a balance of all of the interests in the community. That model is simply lacking for Texas' district courts.

The trial proof showed that Texas' district courts are not collegial bodies. *LULAC*, 914 F.2d at 647 (Higginbotham, J., concurring)(referencing Texas Supreme Court Chief Justice Phillips' testimony at trial). Each court operates autonomously from the other courts in handling its docket and performing its judicial functions. Unlike appellate courts, there is no joint deliberation. *See also LULAC*, 914 F.2d at 649 (Higginbotham, J., concurring). The Voting Rights Act "cannot be made to authorize allocating judges by simply restating the office of a district judge as a shared office or by asserting that the 'function' of an office is not relevant. Saying that district judges in fact share a common office that can be subdistricted does not make it so." *Id.*²¹

²¹Petitioners make two contrary arguments. First, they argue that this analysis improperly makes relief to voters depend on the nature of the office. In fact, however, it is the petitioners who chose to make a dilution attack that is inherently limited to multimember offices. Given that inherent limitation, it is plainly necessary to look at the office under attack at least enough to determine whether the limitation is at issue, as it is here.

III. THIS COURT SHOULD NOT CONSTRUE SECTION 2(b) TO REACH TRIAL JUDGES BECAUSE THAT WOULD REQUIRE THIS COURT TO ADDRESS SERIOUS AND FUNDAMENTAL CONSTITUTIONAL QUESTIONS

If section 2(b) were construed to apply to Texas' district judges, this Court would have to face difficult constitutional questions regarding the validity of section 2(b) so applied. Of course, the existence of these constitutional questions is in itself a reason to construe section 2 not to apply to district court judges. *E.g., Crowell v. Benson*, 285 U.S. 22, 62 (1932). Three serious constitutional questions here argue against construing section 2(b) to apply to Texas' district judges. First, such an application would be an unconstitutional intrusion by the federal government into the intrinsically sovereign aspects of state government. Second, it would unconstitutionally blur the line of separation between judges and the representative arms of government. Finally, if not

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Second, they argue that contrasting multi versus single member offices improperly imports a remedy issue into the liability phase of the case; remedies other than single member offices are possible, such as cumulative voting, they urge. As discussed below, experimental remedies like cumulative voting probably are not permissible judicial remedies. *See infra* note 26. Moreover, this inquiry is not an impermissible injection of remedy in the liability phase, but rather a mandatory inquiry to determine whether the attacked feature -- county-wide election -- is what causes the allegedly dilutive circumstance. *Cf. Thornburg v. Gingles*. Had Petitioners attacked a different feature of the system -- such as a majority vote requirement, had Texas used one -- no such inquiry would be needed. Having chosen to make a dilution attack on the county-wide elections, Petitioners should not now object to the inquiry needed to evaluate that attack.

construed differently or held unconstitutional as applied, this Court would have to consider the general question whether the 1982 amendments to section 2 were constitutional. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 36 S. Ct. 658, 659 (1916) (Holmes, J.).

A. *Application of Section 2(b) to Texas' State Judiciary Would Unconstitutionally Impinge on Intrinsically Sovereign Matters*

1. States Retain a Residual Core of Sovereignty Into Which the Federal Government Cannot Intrude. — For a federal court to dismantle Texas' judicial system would be an unconstitutional intrusion by the federal government into matters of paramount importance to the sovereign state government, in violation of the Tenth Amendment, the Guaranty Clause, and fundamental principles of federalism.²²

The judiciary is an essential governmental function of the states, and dismantling it "would hamper the state government's ability to fulfill its role in the Union and endanger its separate and independent existence." *United Trans. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 (1982); *see also Garcia v. San Antonio Metropolitan Transit*

²²Judge Entz acknowledges that the 14th and 15th Amendments place limitations on the power of states; they did not abolish federalism, however. "Whenever constitutional concerns . . . come in conflict . . . it is and will remain the duty of this Court to reconcile these concerns in the final instance." *Garcia v. San Antonio Metro. Transit Author.*, 469 U.S. 528, 589 (1985) (O'Connor, J., dissenting).

Authority, 469 U.S. 528, 549 (1985) (although overturning *National League of Cities*, the Court recognizes that states occupy a special position in the constitutional system and they do retain a significant amount of sovereign authority); *Coyle v. Smith*, 221 U.S. 559 (1911) (noting restrictions on Congress' ability to prescribe fundamental details of state government such as location of state capitol). As this Court declared in *Texas v. White*, 74 U.S. 700 (1869), "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." *Id.* at 725. Further, as Justice Black noted in his majority opinion in *Oregon v. Mitchell*, 400 U.S. 112 (1970):

No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

Id. at 125.

Consequently, the federal government should tread lightly, granting substantial leeway to the states' establishment and maintenance of judicial systems. As discussed below, *see infra* Part III.A.2, implementation of a remedy will involve the federal courts in dictating the finest details of state judicial structure and administration, including jury selection, jurisdiction, venue, and systems of judicial specialization. As Judge Higginbotham stated, "subdistricting would work a

fundamental change in the scheme of self governance chosen by the State of Texas, for it would change the authority behind the decision-making body of Texas Courts — and in doing so it would retard, not advance the goals of the Voting Rights Act.” *LULAC*, 914 F.2d at 651 (Higginbotham, J., concurring).

Although states must defer in many respects to the federal government, states still have a residue of sovereignty that the federal government cannot disturb. To force wholesale, untested and perhaps unworkable changes upon a state judicial system based upon the sociologically distorted, mathematical vote dilution proof Petitioners offered, would violate the Tenth Amendment, the Fourteenth Amendment, the Guaranty Clause, and fundamental principles of federalism and separation of powers.²³

2. Application of Section 2(b) to State Judges Would Impermissibly Intrude on the Operation of the State Judiciary. — The current system of judicial administration in Dallas County supports fundamental state interests. A remedy in this case necessarily must involve either altering fundamental characteristics of that system, such as county-wide venue and

²³Congress’ ability to interfere with the operation of state government under the authority of the Fourteenth or Fifteenth Amendment is even more questionable since section 2 is outside the scope of the amendments’ literal protection. The Fourteenth and Fifteenth Amendments protect only against intentional discrimination. *See City of Mobile, supra*. The amended section 2, in contrast, purportedly reaches unintentional action that affects the results in elections. If that is a permissible exercise of congressional power to begin with, *see infra*, it surely is at the nadir of Congress’ power, and the power of a statute to displace sovereign state governmental functions must be correspondingly reduced.

jury selection, or attempting to preserve those features while changing elections to smaller than county-wide districts. The District Court's proposed interim remedy followed this latter approach. In either case, the remedy would entail immense intrusion into the finest details of Texas' administration of its judicial system and would be unconstitutional.

Cases filed in Dallas County are randomly assigned to the various judges' dockets. By adopting smaller than county-wide districts while preserving county-wide jurisdiction and venue, the Petitioners would ensure that residents of Dallas County would have cases heard by judges in whose elections they cannot vote. In a "pure" system with thirty-seven single member judicial districts, 36/37 of the voters in Dallas County are thus effectively disenfranchised from voting for any given judge.²⁴ In such a case, the voters are unconstitutionally disenfranchised, just as the nonproperty owners in *Oregon v. Mitchell*, 400 U.S. 112 (1970), were unconstitutionally prevented from voting in a municipal bond election because of their substantial and direct interest in the matter voted upon. *See also City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213 (1970) (exclusion of nonproperty owners from elections approving obligation bonds violated Equal Protection Clause). In an attempt to advance the voting rights of a minority,

²⁴Petitioners suggest that the use of substitute "visiting" judges in some circumstances indicates the policy for voting for judges in Texas is weak. They ignore the fact that visiting judges are used only at the direction of the elected presiding judge, TEX. GOV'T CODE ANN. § 74.056, thus electoral accountability is retained. They also ignore the fact that parties have an absolute right to object to the assignment of a visiting judge in a case. TEX. GOV'T CODE ANN. § 74.053.

Petitioners' solution would unconstitutionally deprive most voters of *their* "judicial" voting rights.

A pure single member district plan also creates difficulties in allocating newly created courts in between the decennial censuses, as illustrated when the district court below imposed its interim single member district plan. The allocational problem in Dallas County was dividing thirty-seven judicial positions among a different number of state legislative districts. At the urging of Petitioners and the Attorney General, the District Court gave the "extra" judicial seats to those legislative districts with the greatest number of minority voters. Thus, judges were allocated in a preferred manner to minority districts. This is surely one of the most flagrant violations of equal protection ever committed in the name of equal rights. The same kind of allocation problem inevitably will occur under any plan to create additional judicial districts between the censuses in response to increased case load.²⁵

²⁵The interim plan also unconstitutionally allocated courts of the various specializations among the various judicial districts; it permitted the county administrative judge to allocate specialization *after the election*, however he or she sees fit. Thus, some voters were deprived of a civil judge, some of a juvenile judge, and so on. Absent some scheme of four concurrent sets of overlapping single member districts, no single member district plan can avoid this unconstitutional allocation of specialized courts. Moreover, under the specifics of the interim plan, the discretion of the administrative judge to assign specializations apparently was wholly unconstrained, which also surely violates due process and equal protection. See *Hurtado v. California*, 110 U.S. 516, 535-36 (1884). It also was impractical in that a successful civil lawyer judicial candidate with no criminal experience could end up assigned to a criminal bench.

Finally, jury pools in Dallas County are drawn from the entire county. This system complies with an accused's right to trial before a jury from the judicial district in which the offense arose. U.S. CONST. AMEND. VI; *United States v. Dickie*, 775 F.2d 607 (5th Cir. 1985). By creating an interim plan in which the districts were smaller than county-wide, but jury selection remained county-wide, the District Court created a system of jury selection that is constitutionally impermissible for criminal cases. Inevitably, under a system of smaller than county-wide districts, an accused from one Dallas County district will be forced to stand trial before a jury containing persons from four or five different Dallas districts for a crime committed in a completely different district. In such a case, the accused would be denied his constitutional rights. *Id.*

The only alternative to avoiding those problems is to alter the current systems of court specialization, jury selection, venue, and court administration, which presents the constitutional problem of undue intrusion into core features of state government.²⁶ These established systems have evolved

²⁶Petitioners suggest that other alternative remedies, such as cumulative or limited voting would avoid these infirmities. What they neglect is that courts' remedial powers in Voting Rights Act cases do not extend to imposing experimental forms of voting upon a state. See *Wise v. Lipscomb*, 437 U.S. 535, 540-41 (1978) (noting "requirement that federal courts, absent special circumstances, employ single-member districts when they impose remedial plans"); *Martin v. Mabus*, 700 F. Supp. 327, 336-37 (S.D. Miss. 1988) (declining to impose limited voting plan court viewed as "experimental"). Admittedly, it is possible that the State of Texas could invent some entirely different form of judicial selection and administration that would avoid the constitutional pitfalls of a single member remedy; the need for such invention, however, simply heightens the unconstitutional intrusion into core concerns of a sovereign state government that application of the statute to the judiciary would have.

locally through years of experience. The systems work, and are of vital importance to the efficient and orderly administration of justice in Dallas County. Although states' rights are limited by the Civil War amendments and by other powers expressly delegated to the federal government, the states do retain the rights to govern themselves with respect to the basic elements of governance. Recent case law does not explicitly list the states' fundamental rights, but surely the power to establish and maintain an independent judiciary is among them. *See supra* Part III.A.1.²⁷ Texas has over the years developed an intricate machinery for the administration of justice that fully complies with all constitutional requirements. Simply yanking out a part or two — countywide elections — produces a machine that does not work, i.e., that is not constitutional. The alternative of redesigning the system entirely is not a legitimate task for the federal government or a federal judge.²⁸

²⁷The United States suggests that the proper way to account for these competing interests is simply to incorporate those concerns into the "totality of circumstances" that the district court considers in determining liability under section 2. *See* Brief of the United States 17-28. But the United States forgets that the "Senate Factors" include assessing the weight of state policy underlying the challenged practice, and the district court here at least purported to consider that factor. Urging that such concerns should be treated as compelling is not substantially different from urging, as Judge Entz does, that they are so compelling that interference with them rises to the level of a constitutional concern. In either case, the Voting Rights Act is not sufficiently forceful to displace those important state policies.

²⁸"It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed." *LULAC*, 914 F.2d at 630-31.

**B. *Applying Section 2(b) to Judges
Violates Principles of Separation of
Powers***

The Petitioners' suggested application of Section 2(b) to state district judges would abolish substantial distinctions between the executive, legislative and judicial branches. That is contrary to the finely-honed balance of powers (and counterbalancing of the natural human desire for power, if left unchecked) that the federal constitution embodies. *See, e.g.*, THE FEDERALIST No. 9, at 51 (A. Hamilton) (J. Cooke ed. 1961); *id.* No. 47, at 323 (J. Madison); *id.* No. 48, at 335 (J. Madison). Texas had a similar, clear separation of powers ingrained in its organic framework. *See* TEX. CONST. art. II, § 1.

At the core of every state's government is the judiciary. Whether appointed or elected, the judiciary is the arbiter of the citizens' disputes, the forum for victims of crime, and the protector of its citizens' fundamental rights and freedoms. While the legislative and executive branches are in perpetual flux, according to the rough and tumble political whims of the times, the judiciary is the only constant. *See LULAC*, 914 F.2d at 625-26. The legislative and executive branches rightfully may be partial, but as Judge Gee stated, "the judiciary serves no representative function whatever: the judge represents no one." *Id.* at 625. Judge Higginbotham in his concurring opinion in *LULAC* explained that "requiring

subdistricting for purposes of electing district judges, unlike other offices, would change the structure of the government because it would change the nature of the decision-making body and diminish the appearance if not fact of its judicial independence — a core element of a judicial office.” *LULAC*, 914 F.2d at 650 (Higginbotham, J., concurring).

The Petitioners not only would redefine judges as “representatives” but would classify particular judges as accountable to the majority sentiment in small, legislative subdistricts from which they were to be elected. Such a result is directly contrary to the foundation of our system of government in which “the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.” *THE FEDERALIST* NO. 48, at 335 (J. Madison)(J. Cooke ed. 1961). Texas incorporates the same concept. *See TEXAS CONST.* art. II, § 1. Congress surely did not mean to strike from Texas’ “separation of powers” the key concept so carefully woven in the federal constitution and extended to the states through the Guaranty Clause.²⁹

Judge Gee, quoting Professor Eugene Hickok, accurately summarizes Judge Entz’s argument:

The judiciary occupies a unique position in our system of separation of powers, and that is why the job of judge differs in a fundamental way from that of a

²⁹“Judicial power” as used in Texas’ constitution, *see* Art. V § 1, does not mean to be a representative of the people. That is what the state Senators and Representatives do in making laws. In fact, Article II specifically provides that no person associated with one branch “shall exercise any power properly attached to either of the others.”

legislator or executive. . . . If a member of congress serves to make the law and a president to enforce it, the judge serves to understand it and interpret it. In this process, *it is quite possible for a judge to render a decision which is directly at odds with the majority sentiment of the citizens at any particular time. . . .* Indeed, it can be argued that *the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour.*

LULAC, 914 F.2d at 626 (quoting Hickok, *Judicial Selection: The Political Roots of Advice and Consent* in *JUDICIAL SELECTION: MERIT, IDEOLOGY AND POLITICS* 5 (1990), emphasis added).

**C. *The 1982 Amendments to Section 2
Were Not A Valid Exercise of
Congress' Authority***

The Supreme Court has never considered whether the 1982 amendments to Section 2 were a valid exercise of congressional authority. Prof. Lawrence Tribe, never one to be mistaken for a conservative constitutional scholar, notes that there is real doubt on that question. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-14, at 340 (2d ed. 1988). Congress itself seriously questioned the constitutionality of the Section 2 amendments. In fact, the Subcommittee on the Constitution concluded in its report that the proposed amendment was unconstitutional for three reasons. First, Congress cannot outlaw discriminatory results under the Fifteenth Amendment, since the Supreme Court has stated that

only discriminatory intent was prohibited.³⁰ Second, unlike Section 5, there was no fact finding by Congress that Section 2 was necessary as a nationwide remedial measure. Without such a fact finding, Congress even questioned if Section 2 could qualify as a “remedial” measure.³¹ Finally, Section 2

³⁰“To the extent . . . that the Supreme Court has construed the Fifteenth Amendment to require some demonstration of purposeful discrimination in order to establish a violation, and to the extent that Section 2 is enacted by Congress under the constitutional authority of the Fifteenth Amendment, the Subcommittee does not believe that Congress is empowered to legislate outside the parameters set by the Court, indeed by the Constitution.” 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 342-43 (COMMITTEE ON THE JUDICIARY’S SUBCOMMITTEE ON THE CONSTITUTION, REPORT ON S. 992 TO AMEND THE VOTING RIGHTS ACT OF 1965, attached as exhibit to Additional Views of Senator Hatch, S. REP. NO. 417, 97th Cong., 2d Sess. 94 (1982)).

³¹“While proponents of the new results test argue that selected Supreme Court decisions exist to justify the expansive exercise of Congressional authority proposed here this subcommittee rejects these arguments. No Court decision approaches the proposition being advocated here that Congress may strike down on a nationwide basis an entire class of laws that are not unconstitutional and that involve so fundamentally the rights of republican self-government guaranteed to each state under Article IV, section 4 of the Constitution.

“It must be emphasized again that what Congress is purporting to do in section 2 is vastly different than what it did in the original Voting Rights Act in 1965. In *South Carolina v. Katzenbach*, the Court recognized extraordinary remedial powers in Congress under section 2 of the Fifteenth Amendment. *Katzenbach* did not authorize Congress to revise the nation’s election laws as it saw fit. Rather, the Court there made clear that the remedial power being employed by Congress in the original Act was founded upon the actual existence of a substantive constitutional violation requiring some remedy . . . While *Katzenbach* and later *City of Rome* held that the extraordinary powers employed by Congress in section 5 were of a clearly remedial character, and therefore justified the extraordinary procedures established in section 5, there is absolutely no record to suggest that the proposed change in section 2 involves a similar remedial exercise. Because section 2 applies in scope to the entire Nation, there is the necessity of demonstrating that the ‘exceptional’ circumstances found by the *Katzenbach* court to exist in the covered jurisdictions in fact permeated the entire Nation (although again by (continued on next page)

has an unconstitutional retroactive effect.³² This Court, like the Subcommittee, should find that Section 2 is unconstitutional for those reasons.

CONCLUSION

For the reasons discussed above, Judge Entz requests that this Court affirm the decision of the Fifth Circuit and render judgment in Judge Entz's favor.

(continued from previous page)

its very definition the concept of 'exceptionality' would seem to preclude such a finding).

"There has been no such evidence offered during either the House or Senate hearings. Indeed, the subject of voting discrimination outside the covered jurisdictions has been virtually ignored during hearings in each chamber. Indeed as the strongest advocates of the House measure themselves argued, a proposed floor amendment to extend preclearance nationally was 'ill-advised' because no factual record existed to justify this stringent constitutional requirement." *Id.* at 343-44.

³²"Moreover, a retroactive results test of the sort contemplated in the House amendments to section 2 (the test would apply to existing electoral structures as well as changes in those structures) has never been approved by the Court even with regard to jurisdictions with a pervasive history of constitutional violations. In *South Carolina v. Katzenbach*, the prospective nature of the section 5 process (applicable only to *changes* in voting laws and procedures) was essential to the Court's determination of constitutionality. This was closely related to findings by Congress that governments in certain areas of the country were erecting new barriers to minority participation in the electoral process even faster than they could be dismantled by the courts. Thus, even with regard to covered jurisdictions, the Court has never upheld a legislative enactment that would apply the extraordinary test of section 5 to existing state and local laws and procedures." *Id.* at 344-45.

Respectfully submitted,

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Abstract

Statement of Income

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This brief is on behalf of the official-capacity state respondents, referred to collectively as either "the state" or "Texas," and who are: the Attorney General of Texas; the Secretary of State of Texas; and the thirteen members of the Texas Judicial Districts Board, including the Chief Justice of the Supreme Court of Texas as chair of the Board.

OPINIONS BELOW

Together, the "Opinions Below" segments of the briefs for the Houston Lawyers' Association petitioners in No. 90-813 ("HLA") and the League of United Latin American Citizens petitioners in No. 90-974 ("LULAC") accurately list the opinions below, except they omit four district court orders entered between the district court's liability determination and its first remedial order. These four orders modify parts of the liability opinion and may be found in the appendix to the state's Memorandum in Response to Petitions for Certiorari, Resp. App. 1a-7a.

STATEMENT OF THE CASE

The plaintiffs' challenge

LULAC originated this case as a challenge to the election of state district judges -- the trial judges of general jurisdiction in Texas, TEX. CONST. art. 5, § 8 -- in over 200 judicial districts in forty-four counties. By trial, the challenge had narrowed to 172 judicial districts -- and 172 judgeships -- in ten counties. The trial was to a one-judge federal district court.

The racial or language minority group lodging the challenge varied by county, as did the number of judicial districts:¹ (a) Black voters only against the 59 judicial

¹ The three principal racial and language groupings relevant to this case are Black, Hispanic, and Anglo. "Black" is used in deference to the apparent preference of most Black Americans. See N.Y. Times, Jan. 29, 1991, § A, at 19 col. 1 (reporting results of poll of Blacks by Joint Center for Political and

districts in Harris County, the 37 districts in Dallas County, the 23 districts in Tarrant County, and the 8 districts in Jefferson County; (b) Hispanic voters only against the 19 districts in Bexar County and the 13 districts in Travis County; and (c) the combination of Black and Hispanic voters against the 6 districts in Lubbock County,² the 4 districts in Ector County, and the 3 districts in Midland County. Statewide, Texas now has 386 state district judges subject to election in 386 judicial districts.³

The challengers argued that the Texas system for electing state district judges in the targeted counties violates the United States Constitution and Section 2 of the Voting Rights Act, as amended, 42 USC 1973 (1982). The statutory challenge was brought, tried, and decided

Economic Studies). "Hispanic" is used to be consistent with most of the demographic data in the case, even though the overwhelming majority of Hispanics in Texas are Mexican-Americans. "Anglo" is used to denote non-Hispanic whites.

² Only 5 districts coincide with Lubbock County's boundaries. One judicial district, the 72nd, encompasses two counties, Lubbock and Crosby. TEX. GOVT CODE § 24.174(a). Crosby is a tenth targeted county, even though the record in the case sometimes indicates that nine counties are targeted.

³ Since trial, three new judicial districts have been added in the ten targeted counties, two in Tarrant County, and one in Lubbock County, bringing the number of judicial districts directly involved in this case to 175. Also, four additional district judgeships will be added in Tarrant County if certain preconditions are met at the county level, which would bring the number of Texas state district judges subject to election to 390. This post-trial data is from the record of *Mexican American Bar Ass'n of Texas v. Texas*, 755 F.Supp. 735 (W.D. Tex. 1990) (3-judge court) ("MABA"), the private plaintiffs' appeal from which is pending with the Court as No. 90-1352. The MABA record also discloses HLA's error in stating that the Attorney General lodged a Section 5 objection to 15 district judgeships created in 1990 Texas legislation. HLA Brief 13 n.15. As he "clarified" in a November 20, 1990, letter, the Attorney General objected to only 9 of the 15 new judgeships. U.S. Br. in MABA 6 n.9. The MABA district court held that even these nine had been precleared by operation of law.

under the framework for analyzing racial vote dilution challenges to at-large electoral systems established in *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*"). As the Fifth Circuit en banc opinion stated:

Plaintiffs attacked the Texas laws providing for countywide, at-large election of judges of the trial court of general jurisdiction, asserting that the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength.

Pet. App. 6a.

History and configuration of Texas district courts

Both the use of counties as the basic political unit and the current system of electing district judges have long Texas lineages. County government historically has been the primary governmental unit in Texas since the days of the Texas Revolution in 1836. Tr. 4-138.

As to judicial selection, upon admission to statehood in 1845, the state of Texas retained essentially the same system for appointing district judges to serve in judicial districts that it had as an independent Republic. Guittard, *Court Reform, Texas Style*, 21 SW.L.J. 451, 456 (1967). It moved to elected district judges in 1850 and back to appointed ones in the constitution of 1861. Texas constitutions adopted subsequent to the 1861 constitution, including the current one adopted in 1876, have provided for district judges elected from defined districts. Pet. App. 93a-94a. Since 1907, the defined judicial districts have been contiguous with county boundaries, and there has been only one judge per district. Pet. App. 94a-95a.

Texas district judges are elected from statutorily created judicial districts. See, e.g., TEX. GOV'T CODE § 24.388(a) (creating the 209th Judicial District in Harris

County). The judicial districts must be contiguous with county lines unless, through a thus far untapped exercise of their franchise, county voters authorize a judicial district smaller than a county. TEX. CONST. art. 5, § 7a(i). With the exception of the 72nd district, each judicial district in the targeted counties is coextensive with one county, and state district judges are elected by countywide vote in general elections.

The county also forms the basic venue unit for district courts. TEX. CIV. PRAC. & REM. CODE § 15.001.⁴ With the backdrop of the county as the basic electoral and venue unit, the Chief Justice of the Supreme Court of Texas testified about trial judge accountability. His view was that a district judge should not be responsible to the voters of an area any smaller than the one in which the judge exercises primary jurisdiction. Tr. 5-78. See also Pet. App. 282a.

Judicial election and eligibility

Texas elects its district judges in partisan races conducted at the same time as other state partisan races.⁵ Political parties nominate judicial candidates in general primaries and runoffs. A candidate must receive a majority of the vote to be the party's nominee at the general election. TEX. ELEC. CODE § 172.003. The winner of the plurality of the votes at the general election is elected to the office of district judge. TEX. ELEC. CODE § 2.001. Thus, one set of judicial elections, the party

⁴ Some Texas venue provisions are mandatory, to the point of being jurisdictional, and some are permissive. See generally *Gambill v. Town of Ponder*, 494 S.W.2d 808, 809-11 (Tex. 1973). Regardless, the county remains the touchstone.

⁵ HLA mistakenly states that judicial elections are conducted at the same time as municipal elections. HLA Brief 7, 43.

primaries, has a majority vote requirement and the other, the general election, does not.

LULAC and HLA principally targeted general elections, not primary elections. The only party primaries targeted were the Democratic party primaries in Travis and Jefferson counties.⁶

Texas district judges serve four year, unevenly staggered terms. TEX. CONST. art. 5, § 7.⁷ The state constitution establishes minimum eligibility requirements for district judges: (a) they must be citizens of the United States and Texas; (b) they must be licensed to practice law in Texas and have been a practicing lawyer or a Texas court judge or both combined for four years at the time of election; and (c) they must reside in the district for two years at the time of election. *Id.* They must be at least twenty-five years old. TEX. GOV'T CODE § 24.001.

The pool of Black and Hispanic lawyers eligible to be district judge is proportionately far smaller than the pool of Black and Hispanic voters eligible to vote for district judge. A trial comparison by county and by the type of voter challenge -- Black, Hispanic, or combined -- reveals the following:⁸

⁶ The district court's interim remedy did not tailor relief to the type of targeted election (primary or general); instead, it dissolved the distinction by ordering relief sought by no plaintiff: non-partisan judicial elections. J.A. 164a.

⁷ The district court's stayed interim remedial order illustrates the unevenness of the staggering of terms. Of the then-172 judgeships under challenge, the interim order would have affected 115 judgeships which were open for election in 1990, including 32 of the 37 in Dallas County. J.A. 163a.

⁸ The eligibility minority lawyer percentages are from a poll whose results are tabulated in Table 2 of State Exh. D-4. The eligible voter percentages are taken from the district court's findings, Pet. App. 200a-208a, adjusted to account for non-citizens who are voting age in Travis, Lubbock, Ector, and Midland counties, which adjustment is derived from LULAC Exh. Tr-18, L-11, E-13, and M-15.

<u>County (Minority)</u>	<u>% Eligible Minority</u>	<u>% Eligible Minority</u>
	<u>Lawyers</u>	<u>Voters</u>
Harris (Black)	3.8	18.2
Dallas (Black)	1.0	16.0
Tarrant (Black)	2.4	10.4
Bexar (Hispanic)	11.4	41.1
Travis (Hispanic)	2.7	13.5
Jefferson (Black)	3.1	24.6
Lubbock (Combined)	5.1	14.9
Ector (Combined)	3.7	16.0
Midland (Combined)	3.4	10.6

With few exceptions, Texas district judge elections are low profile and issueless. District judge races typically appear low on a ballot that already lists more races than most other states. Tr. 5-182.⁹ The voters display little knowledge or interest in the comparatively few contested judicial elections. Straight ticket party voting is permitted, and a high percentage of votes are cast for district judges using straight ticket voting.¹⁰ In

⁹ Because vacancies are filled by gubernatorial appointment, special elections never occur for district judges. The consequence is that district judge elections always are buried low on a ballot that can include races for President, Vice-President, United States Senate, United States Congress, Governor, Lieutenant Governor, Attorney General, Comptroller, Land Commissioner, Agriculture Commissioner, Railroad Commissioner(s), Supreme Court Justices, Court of Criminal Appeals Justices, State Board of Education member, Court of Appeals Justices, State Senator, State Representative, County Court at Law Judge, Justice of the Peace, County Judge, County Commissioner, County Clerk, District Clerk, County Treasurer, Constable, and other county offices.

¹⁰ The district court observed:

It was brought to the Court's attention that perhaps a majority of the voters in a General Election, and for that matter, in Primary Elections, have no idea of the qualification of a judge for whom they vote. Their vote is cast because a straight ticket is being cast, and a straight ticket includes judicial nominees from a particular political party.

Pet. App. 188a.

Harris County in 1980, for example, a study found that 90% of Republican voters, 89.3% of Democratic voters, and 98% of the voters in predominantly Black precincts cast straight party votes in judicial races. Tr. 5-228.

District court liability decision

The trial court in this case rejected the constitutional claims of LULAC and HLA, finding that the Texas system for electing its district judges is not maintained as a tenuous pretext for discrimination. Pet. App. 283a. It also found that LULAC and HLA had not established intentional racial discrimination in Texas's establishment and maintenance of its judicial election system. Pet. App. 302a. This determination went unappealed.

The trial court did find unintentional racial vote dilution in the challenged judicial districts in all the targeted counties and a consequent violation of the effects, or results, standard of amended Section 2; however, in doing so, it specifically rejected principles of voting rights analysis announced by the Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) ("*Chavis*"). Pet. App. 287a ("[p]arty affiliation is simply irrelevant" in analyzing racial bloc voting patterns); 298a ("not . . . legally competent evidence").¹¹

¹¹ The import of Texas's *Chavis* argument for *Gingles*-style racial polarization analysis is accurately summarized in the district court's liability decision, see Pet. App. 286a, which nonetheless is factually skewed by the rejection of *Chavis*. The picture of racially polarized patterns is fundamentally different when viewed from the perspective of *Chavis*-based facts instead of *Chavis*-rejecting facts. The difference when partisan voting patterns are factored into the analysis is illustrated by the situation in Dallas County. There, during the 1980's, Democratic judicial candidates (regardless of their race) lost, and Republican judicial candidates (regardless of their race) won. Tr. 4-99, 4-101, 5-193--5-194 (also noting the one anomaly attributable to the Democratic candidate's name being the same as a longtime local media personality. LULAC's expert acknowledged a stronger association between the party of a judicial candidate and electoral success than between the race of the candidate and

Finally, the district court found Texas district judges to be "sole, independent decision makers," but attached no legal significance to it in light of then-prevailing Fifth Circuit law. Pet. App. 289a n.32.

Fifth Circuit en banc opinions

In its en banc consideration of the case, the Fifth Circuit voted twelve-to-one to reverse the district court and render judgment against LULAC and HLA. By a seven-to-six majority, the court held that the results test of amended Section 2 is inapplicable to judicial elections. Pet. App. 1a-35a.

In a concurring opinion by Judge Higginbotham, five members of the court (one of whom also voted with the majority) adopted the principle that there can be no unintentional vote dilution in elections for officials who are solo decisionmakers holding single-member offices. Pet. App. 90a-114a.

One member of the court, Chief Judge Clark, joined in no other opinions but specially concurred in the result, Pet. App. 36a-46a, reasoning that Texas has a "fundamental right" to choose to have judges elected who serve "the same jurisdictional area as that which defines the electorate," *id.*, 39a, 44a. Judge Johnson alone dissented from the decision to reverse and render judgment, Pet. App. 115a-182a, although he would not have affirmed the interim remedial order's requirement that judicial elections under it be nonpartisan, *id.*, at 163a n.25.

electoral success. Tr. 2-147. He would prefer to know the party of the candidate over the race of the candidate to predict the outcome of a Dallas County judicial race. Tr. 2-149.

SUMMARY OF ARGUMENT

Coverage

The meaning and reach of the 1982 amendments to section 2 of the Voting Rights Act are the focus of this case; however, the plain meaning of the statute is not the issue to be confronted.

The issue the Court must confront is whether Congress has exercised its authority under the Enforcement Clauses of the Civil War Amendments -- specifically, the Fourteenth and Fifteenth Amendments -- to prohibit state action that does not violate the Constitution standing alone. Congress may not exercise its enforcement authority consistent with the venerable doctrine of judicial review unless it actively employs its special factfinding competence and determines that constitutional guarantees announced by the Court are being underenforced in a particular way in a particular setting.

Congress amended section 2 to institute a statutory effects standard in reaction to *City of Mobile v. Bolden*. One of the principles established by the Bolden plurality was that the original section 2 reached no further than the Constitution.

There is virtual unanimity among the parties that Congress gave virtually no thought to state judicial elections during the amendment process. The Court, however, has conditioned the constitutionality of congressional employment of its enforcement powers under the Fourteenth and Fifteenth Amendments on Congress's doing precisely what it did not do in 1982 with regard to state judges: that is, deliberating carefully over whether the facts and conditions in the states warrant a particular statutory response from Congress.

The state action here is not just any state action; it is Texas's choice about how to select its courts of primary jurisdiction. There is no function more at the core of a state's authority to choose its system of governance than the judicial function. The fundamental nature of federalism is to protect such a core state function, yet the challengers urge upon the Court a reading of the Voting Rights Act which permits federal courts to order a fundamental restructuring of Texas's trial judiciary. Federal and state courts have a long history of independent operation and existence, as well as interdependence, which would be seriously threatened by the authority the challengers would have the Court find in the effects test component of amended section 2.

Springing from the constitutionally-based constraints on congressional action imposed by the doctrine of judicial review and the basic concept of federalism is the principle of statutory construction which requires Congress to clearly and unequivocally express its intention to use its Enforcement Clause powers to permit the compelled restructuring of state judicial selection systems.

There is no clear statement in either amended section 2 or its legislative history of Congress's intent to target state judicial systems in the 1982 amendments to section 2 of the Voting Rights Act. Thus, the effects arm of amended section 2 does not reach state judicial systems.

Solo decisionmaker

Even if the amendments extended the effects test to state judicial systems, Texas's system for electing its district judges does not violate the vote dilution prohibition embodied in amended section 2. The district judges are solo decisionmakers.

The theoretical concept of vote dilution, amorphous though it be, is inapplicable to at-large systems for electing public officials who function as solo decisionmakers. Other types of section 2 claims might be established, but other types of claims were not lodged here. The case was tried and decided under the *Thornburg v. Gingles* framework, which applies only to at-large vote dilution cases.

At-large vote dilution claims cannot be established against electoral systems electing solo decisionmakers because permitting them would threaten the state's choice of the basic unit to be represented by any given official arm of its government.

Thornburg v. Gingles establishes single member districts as the remedy that must be used as the paradigm in the first step of the liability phase of a vote dilution case. The unit represented by solo decisionmakers is a choice for the state to make. Carving such a unit into single member districts destroys the choice and splinters the state's fundamental political framework when solo decisionmakers are involved, although not when collegial decisionmakers are.

ARGUMENT

I

THE EFFECTS TEST OF AMENDED SECTION 2 DOES NOT APPLY TO STATE JUDICIAL ELECTIONS BECAUSE CONGRESS HAS NOT CLEARLY AND UNEQUIVOCALLY STATED AN INTENT TO EXERCISE ITS ENFORCEMENT CLAUSE POWERS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO REACH STATE JUDICIAL ELECTION SYSTEMS WHICH ARE NOT INTENTIONALLY DISCRIMINATORY

The United States is, in a sense, quite correct in observing that the crucial clue in this case is that "the dog did not bark." U.S. Br. 32., *Chisom v. Roemer*, Nos. 90-757 and 90-1032. The silence is precisely the problem. There *must* be a distinct bark from Congress before it may so fundamentally alter the relationship between the state and federal systems of justice.

The Necessity of a Clear Statement from Congress

The central question is not whether Congress *may* exercise its enforcement authority under section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment to outlaw unintentional racial vote dilution in elected state judicial systems, such as Texas's, which have been determined to be constitutionally maintained.¹² Instead, the question is whether Congress *has* done so. The questions, however, are linked. Answering the second question posed here requires consideration of the basis for an affirmative answer to the first one.

¹² The district court's finding that Texas's district judge election system is constitutional is now unchallenged. *Supra*, at 7.

The linkage between the two questions finds expression in the clear statement rule of statutory construction. In the setting of this case, the rule means that Congress must have clearly and manifestly expressed its intention in amended section 2 or its legislative history to intrude into the sphere of state judicial autonomy by extending section 2 to reach beyond the intent of state action to the effect of state action. Amended section 2's broad antidiscrimination language reveals no such intent, and the legislative history, devoid of even the slightest reference to judicial elections, indicates there was none.

Thus, the clear statement rule, with its roots in constitutional requirements of judicial review and related constraints of federalism, leads to the conclusion that amended section 2 does not cover judicial elections when the effects test is the only basis for liability. After more than a century of arguable constitutional power to do so, Congress in 1982 did not use its enforcement authority under the Fourteenth and Fifteenth Amendments for a fresh intrusion -- through the effects test -- into a core area of state autonomy.

The analysis of why the Court must draw this conclusion, and affirm the judgment of the Fifth Circuit,¹³ requires a review of the basis for the clear statement rule in the context of the challenge lodged in this case and a canvass of section 2's development since its inception in 1965, when the original Voting Rights Act ("the Act"), Pub. L. No. 89-110, 79 Stat. 437, was passed.

¹³ Texas urges a different ground for affirmance than the one forming the basis for the Fifth Circuit's en banc majority opinion.

Sources of the Clear Statement Rule

The constraints imposed by the doctrine of judicial review and the Enforcement Clauses of the Civil War Amendments

Amended section 2 outlaws state action which this Court has held does not violate either the Fourteenth or Fifteenth Amendment. It outlaws unintentional but effective discrimination, whereas the Constitution outlaws only intentional discrimination.

The original section 2 was "an uncontroversial provision." *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (plurality opinion) ("*Bolden*"). It was the Act's other provisions which "engendered protracted dispute." *Id.* Indeed, in contrast to the "sparse legislative history" of section 2, *id.*, at 60-61, the other provisions received extended congressional attention before passage of the Act, including extended congressional floor debate. *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966) ("*South Carolina*").

The Court did not have section 2 before it in *South Carolina*, though it did remark that the provision "broadly prohibits the use of voting rules to abridge the exercise of the franchise on racial grounds." 383 U.S. at 316; see also *Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969) ("*Allen*"). *Bolden*, though, explained that, however sparse, section 2's legislative history clearly demonstrated that section 2's reach was coextensive with the Fifteenth Amendment. 446 U.S. at 61.¹⁴

Section 2 was unaffected by the Voting Rights Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; however, Section 206 of the 1975 amendments to the

¹⁴ The original section 2's unexceptionable reach undoubtedly accounts for the spare legislative history.

Act, Pub. L. No. 94-73, 89 Stat. 400, brought language minority citizens within the ambit of section 2. Section 207 of the 1975 amendments defined persons "of Spanish heritage" to be language minority citizens.¹⁵

The 1975 amendments also contained some confirmation of the accuracy of the *Bolden* plurality's reading of the reach of section 2.¹⁶ Section 402 of the amendments added subsection (e) to Section 14 of the 1965 Act to provide attorney fees to the prevailing party in lawsuits "to enforce the voting guarantees of *the fourteenth or fifteenth amendment*["] (emphasis added).¹⁷

The *Bolden* plurality's conclusion that the Fifteenth Amendment required proof of discriminatory intent in racial vote dilution challenges to at-large electoral systems meant that section 2 also required such proof. Stated another way, *Bolden* meant that the antidiscrimination principle embodied in the original section 2 "added nothing" to preexisting constitutional protections. *Rogers v. Lodge*, 458 U.S. 613, 619 n.6 (1982). Section 2 became a substantive irrelevancy as

¹⁵ The 1975 amendments also brought Texas and its political subdivisions under the Act's preclearance requirements.

¹⁶ See discussion *supra*, about section 2 extending no further than the Constitution.

¹⁷ The attorney fee provision, codified as 42 USC 1973l(e), was not amended in 1982, when section 2 was. Thus, Congress has not exercised its enforcement powers under either section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment to extend the attorney fee provision to section 2 cases resting on the effects test to establish liability. Section 14(e), then, does not reach as far as amended section 2. The *Bolden* plurality would seem to compel the conclusion that statutory attorney fees are available only when voting rights liability rests on proof of intentional discrimination – which this case does not.

long as it and the Fifteenth Amendment remained unchanged.¹⁸

Congress reacted to *Bolden* by amending section 2. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, § 3. The principal objective of the amendment was to add an effects test as an alternative to the intent test for determining whether the provision had been violated. This partial legislative uncoupling of section 2 from the Constitution, under the authority of the congressional enforcement sections of the Fourteenth and Fifteenth Amendments, breathed life for the first time into the Voting Rights Act's basic antidiscrimination prohibition.

For more than a century, the people through their Constitution had acknowledged the illegality of intentionally discriminatory, race-based state action. As long as the federal declarations of illegality (be they legislative or judicial) were intent-based, the people of the states had consented to federal intrusions into what would otherwise have been constitutionally protected spheres of state autonomy. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating racially based state constitutional disenfranchisement provision and explaining that "the Tenth Amendment cannot save legislation prohibited by the subsequently enacted Fourteenth Amendment"). With its move from intent to effect as the standard for measuring challenged election systems, Congress introduced a major alteration between the federal government and the states.

¹⁸ Indeed, *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980) ("*Voter Information Project*"), decided shortly before *Bolden*, is proof of the original section 2's irrelevancy in a case with special pertinence to the issues here: a racial vote dilution challenge to an at-large system for electing judges. Section 2 is not even mentioned in the opinion, which is premised on the Fourteenth and Fifteenth Amendments.

Principles of judicial review established in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), however, limit congressional power to alter the Court's determination of the Constitution's reach. In a case concerning section 5 of the Voting Rights Act, the Court upheld Congress's authority under section 2 of the Fifteenth Amendment to prohibit state action that has a discriminatory impact. *City of Rome v. United States*, 446 U.S. 156, 173-78 (1980) ("*City of Rome*").¹⁹ Earlier voting cases addressed at some length the principles governing legislation enacted pursuant to the congressional enforcement provisions of the Fourteenth and Fifteenth Amendments. See *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, *supra*.

The empirical premise for upholding congressional power in these cases is the superior fact-finding abilities of the legislative body. See, e.g., *Katzenbach v. Morgan*, 384 U.S. at 656 (referring to "specially informed legislative competence"). Justice Brennan's opinion (joined by Justices White and Marshall) in *Oregon v. Mitchell* re-emphasizes the necessity of deference to legislative fact-finding in the judicial review of congressional action under the Enforcement Clauses of the Civil War Amendments. 400 U.S. at 246-50. Justice Black's opinion in the case took a similar view, emphasizing the need for "legislative findings" when Congress seeks to use the Enforcement Clauses to "invade an area preserved to the States." *Id.*, at 130.

This premise about congressional fact-finding competence leads one of the foremost constitutional

¹⁹ In the context of a congressional redistricting challenge, the Court has summarily affirmed the constitutionality of the addition of the effects test to section 2. *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984), *aff'g*, 604 F.Supp. 807 (N.D. Miss.) (3-judge court).

scholars to predict that when and if the question of the constitutionality of the 1982 amendments to section 2 comes before the Court for plenary review, the supporters of amended section 2 will seek to uphold it on Congress's "fact-finding abilities" to determine that racially disproportionate effects cloak intent. L. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 5-14, at 340 (2d ed. 1988). These fact-finding abilities, so critical to the constitutional validity of amended section 2, also are the underpinning for the requirement of a clear statement in connection with the kind of legislation before the Court.

If Congress is to use its specially informed competence at fact-finding to constitutionally justify legislation encroaching on traditional state domains in ways the constitution, standing alone, does not, then it must be concluded that the legislative encroachment has not occurred if the fact-finding ability has not been exercised regarding a given state domain. Otherwise, the legislative activity legitimating the legislative act of intruding into a state domain when the Constitution standing alone has not done it is absent. Its absence deprives the legislative act of its constitutional basis.

Thus, when Congress acts pursuant to its Fourteenth and Fifteenth Amendment enforcement authority, the statute and its relevant legislative history must manifest congressional deliberation over the reason for intruding into the states' domain. Congressional awareness and deliberation, not inadvertence, is a constitutional necessity in this context:

In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989), quoting *United States v. Bass*, 404 U.S. 336, 349 (1971).

Enforcement legislation pursuant to Congress's constitutional powers under the Civil War Amendments must reflect "a considered decision of the Congress[.]" *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980) (plurality opinion). In this area, at any rate, Congress may not legislate in a vacuum through inattention.

Federalism constraints

The other constraint underpinning the requirement of a clear statement of congressional intent in this arena of activity is related to the one just discussed; however, the emphasis shifts from the federal level to the state level and the particular state domain purportedly targeted by the federal actor. Its origins are kin to the concept of "Our Federalism" explained in Justice Black's sweeping language:

Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Younger v. Harris, 401 U.S. 37, 43 (1971); see also *Trainor v. Hernandez*, 431 U.S. 434, 441 (1977) (stressing the importance of federalism principles, "particularly with the operation of state courts").

The Court's concern that state judicial functions receive special insulation (but not immunity) from federal encroachments finds expression in numerous judicially-developed doctrines. To give federal courts exclusive jurisdiction over a federal cause of action, Congress must affirmatively divest state courts of their presumptively

concurrent jurisdiction. *Yellow Freight System, Inc. v. Donnelly*, 110 S.Ct. 1566, 1568 (1990).

To avoid trenching upon basic tenets of comity and federalism, Congress must "clearly manifest" its intent to deprive state court judgments of finality when enacting federal remedial legislation. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 477-78 (1982). To protect the independent role of the state judiciary, the presumption is that Congress would have specifically abolished the doctrine of judicial immunity from damages under 42 USC 1983 if it had intended to do so. *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). Even when permitting federal legislation to reach judges without explicitly stating that it was doing so, the Court has been careful to insulate the judicial function from the reach of federal legislation. *See Forrester v. White*, 484 U.S. 219 (1988) (permitting § 1983 damages recovery for gender discrimination from state judge in his capacity as administrator, not judge).

These doctrines undoubtedly spring from crucial role played by state courts in administering justice in an interdependent federal system. State courts, of course, develop doctrines of state law to which federal courts must defer in a variety of ways. Lower federal courts lack the power to review state court decisions. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Even this Court is constitutionally disabled from reviewing state court decisions if they rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Sometimes, federal courts must abstain even from deciding cases within their jurisdiction to await state court resolution of unsettled state law questions. *See, e.g., Askew v. Hargrave*, 401 U.S. 476 (1971). State courts also function alongside the federal courts in deciding questions of federal law. *See, e.g., Stone v.*

Powell, 428 U.S. 465, 493 n.35 (1976) ("State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law[.]" citing *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-44 (1816)).

Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) ("*Atlantic Coast Line*"), is an exposition of why the synthesis of these doctrines is the Court's requirement that Congress clearly and manifestly indicate its intent to intrude into state judicial functions before such intrusion may be held to occur. Observing that one of the powers reserved to the states was the maintenance of state judicial systems, the Court stated:

[F]rom the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other

398 U.S. at 285-86.

Construing the reach of the Anti-Injunction Act, 28 USC 2283, the Court noted that the act's protection of state courts rested partially on "the fundamental constitutional independence of the States and their courts[.]" *Id.*, at 287. Then, the Court established the standard that must guide the Court in this case is construing amended section 2:

Any doubts as to the propriety of a federal injunction . . . should be resolved in favor or permitting the state courts to proceed in an orderly fashion. . . . The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.

398 U.S. at 297 (emphasis added).²⁰

²⁰ Echoing the *Atlantic Coast Line* principle, a commentator has remarked: "It is difficult to conceive of a state function more integral than dispute resolution

The Court has not receded from these federalism-based principles of statutory construction when federal court impingement on state judicial functions is at issue. *Mitchum v. Foster*, 407 U.S. 225 (1972), held that section 1983 was an exception to the Anti-Injunction Act, but it used the *Atlantic Coast Line* standard. As explained by Chief Justice Rehnquist's plurality opinion in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 634 (1977), the absence of express statutory language in *Mitchum v. Foster* was "cured by the presence of relevant legislative history." There is no such cure in the legislative history of amended section 2.

Clear statement rule: Confluence of Federalism and Judicial Review

Thus, principles of both federalism and judicial review underly the requirement of a clear statement here, a requirement that is at its most intense when the purported federal intrusion is into the core of the state's domain, its judicial system. In amending section 2, Congress clearly intended to extend the effects test to state-level executive and legislative functions. From all that can be discerned from the authoritative sources, the thought of state judicial systems simply did not surface in the collective conscience of Congress.

Legislative history of amended section 2

There is no indication that Congress envisioned the major alteration of outlawing unintentional discriminatory effects to extend to the relationship of the federal government to state judicial systems. More particularly, there is no hint of congressional awareness that it might

through a court system." Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 HAST. L.J. 1337, 1349 n.74 (1980).

be fundamentally altering the two-century long coexistence of "two essentially separate legal systems," *Atlantic Coast Line*, 398 U.S. at 286, by empowering one (the federal system) to fundamentally restructure the other (state systems) for unintentionally discriminatory state action.

Nothing in the relevant legislative history suggests that Congress even remotely contemplated judicial elections when it was inserting an effects test into section 2. The Court recognizes the Senate Report accompanying the 1982 amendments as an "authoritative source" for interpretive guidance for section 2. *Gingles*, 478 U.S. at 43 n.7. The report extensively canvasses pre-*Bolden* racial vote dilution case law. Challenges to virtually every conceivable governmental body are listed and discussed: state legislatures; county commissioners; cities; and school boards. All these governmental bodies are either legislative or executive. Nothing is said about judicial elections, and the only reported pre-*Bolden*, pre-amended section 2 judicial vote dilution case, *Voter Information Project*, *supra* note 18, is neither cited nor discussed.²¹

Try as they might, the petitioners and their *amici* can find nothing in the relevant legislative history indicating that Congress contemplated that its 1982

²¹ Nor are the pre-*Bolden* cases holding that the one-person one-vote principle is inapplicable to judicial electoral systems, *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972) (3-judge court), *aff'd*, 409 U.S. 1095 (1973), and *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971) (3-judge court), *aff'd*, 409 U.S. 807 (1972). The Congressional understanding was that the concept of racial vote dilution is linked to the one-person one-vote anti-dilution principle, hence the Senate Report's use of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), which itself linked the two concepts. 485 F.2d at 1303. Thus, Congress's failure to even mention these two Supreme Court summary affirmances further validates a point that seems obvious: Congress was not thinking about judicial elections when it amended section 2.

ensconcement of an effects test into section 2 swept within its scope elected state judges.²² In fact, their briefs support the very proposition urged here by Texas. They acknowledge that there was not a single reference "anywhere in the legislative history of the 1982 amendments" to any of the pre-1982 amendment cases holding that the one-person one-vote principle is inapplicable to judicial election systems. HLA Br. 41 n.27, *Chisom v. Roemer*.

In an even more significant admission, they also acknowledge that there was only one explicit statement during congressional consideration of the 1982 amendments "regarding the coverage of judicial elections under section 2[.]" *Id.*, 41 n.26. The statement itself is at best an oblique reference to judges, mentioning "judicial districts" in a "cautionary parade of horrors to be found in subcommittee report hostile to the proposed 1982 amendments." Pet. App. 30a.²³ The statement was made by Senator Hatch, a staunch *opponent* of the amendment. It means virtually nothing in discerning the effects arm of amended section 2, because opposition statements carry "relatively little weight" in discerning a statute's meaning. *Holtzman v. Schlesinger*, 414 U.S. 1304, 1312 (1973); see also *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29 (1988). *

²² The legislative history of the 1965 Act and the 1970 and 1975 amendments, even were the petitioners able to find indications of an intent to cover elected judges, say nothing about the intent behind the 1982 amendments and whether the effects test covers judges. The original Act and the two earlier amendments were pre-*Bolden* and, therefore, concerned only the intent standard for section 2. That earlier legislative history, therefore, is irrelevant to the issue currently before the Court.

²³ Even a glancing reference to judicial districts does not necessarily constitute a reference to judges. See Pet. App. 31a n.14 (in the region covered by the Fifth Circuit, officials such as sheriffs, highway commissioners, district attorneys, and clerks of court are elected from judicial districts).

The only other part of the legislative history with even scant reference to judges is found scattered in oblique references through the extensive congressional hearings. The meager collection of references is in Judge Higginbotham's concurrence. Pet. App. 67a-68a. The little that is there adds nothing. Witness statements in hearings which are not included in official congressional reports (as these were not) are accorded no significance in determining the meaning and reach of a statute. *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986).

Congressional silence and inattention

The watchdog is silent when judges pass by. Congress never focused on judges. It thus did not make the fact findings or give the careful consideration to the consequences of bringing elected judges within the reach of section 2's effects test which is constitutionally demanded in the proper exercise of its enforcement authority under the Fourteenth and Fifteenth Amendments. Instead, it devoted its attention to restoring its view of the pre-*Bolden* case law -- case law that does not include one single statutory vote dilution case involving judges.

A fair reading of this history can only lead to the conclusion that is implicitly suggested by the recent flowering of judicial vote dilution challenges. Congress never seriously thought about judges when it was amending section 2, and never having seriously thought about the matter, it did not intend to cover it. Judicial elections simply never surfaced as a congressional concern in this delicate and contentious area of the law.²⁴

²⁴ That Congressionally-ordained intrusive restructurings of state judicial selection methods are strange paths hidden from notice by Congressional travelers is illustrated by a consideration of the status of non-elective state judicial systems. The Fourteenth Amendment proscribes intentional racial discrimination in the *appointment* of state judges, as well as in the *election* of

The Unjoined Debate on Judicial Coverage

Had Congress thought about it, there would have been much to discuss in connection with whether the effects test for racial discrimination in voting should be extended to elected state judicial systems. The absence of *any* discussion of *any* of these points is mute, and therefore compelling, testimony to the absence of congressional intent to extend amended section 2 to elected judges.

No prior decisional guidance on the effects test and judges

To support the decision to add a results test to section 2, the authoritative Senate Report stated:

The "results" test to be codified in Section 2 is a well defined standard, first enunciated by the Supreme Court and followed in numerous lower federal court decisions. This test will provide ample guidance to federal courts when they are called upon to review the validity of election laws and procedures challenged under Section 2.

S. Rep. No. 97-417, p. 16 (1982). Judicial elections *are* different and the role played by those elected in them is fundamentally different than the kinds of elections and elected officials to which racial vote dilution principles had been applied when the 1982 amendments were passed.

The only racial vote dilution case involving judges, completely unnoticed by Congress in 1982 (or any other time, for that matter), *Voter Information Project*, was on

state judges, but Congress never has exercised its enforcement powers under section 5 of the amendment to statutorily prohibit such actions.

its face an intentional discrimination case and came to the Fifth Circuit on upon the grant of a motion to dismiss. Thus, there had been no factual test of such a case in the courts by the time Congress acted, and its confidence in the standard having been "well defined" would not have been so strong, had it thought about judges and how they are different.

Envisioning the debate that would have occurred had Congress been concerned about judges adds confidence to the conclusion that the coverage is not there. The major elements of the debate that never occurred are canvassed below.

The troublesome inapplicability of one-person, one-vote

The inapplicability of the one-person one-vote principle in judicial elections would have given Congress pause. The standard for evaluating a vote dilution challenge using the effects test is not apparent when the one-person one-vote principle is inapplicable. As Justice O'Connor analyzed it in *Gingles*:

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2 . . . It is . . . necessary to construct a measure of "undiluted" minority voting strength.

478 U.S. at 88 (J. O'Connor, concurring).

The yardstick adopted in *Gingles* -- a calculation of the minority's potential voting strength in a single-member district -- assumes the applicability of the one-person one-vote rule and that each district has approximately the same population. 478 U.S. at 50-51 n.17, 89-90. Otherwise, the Court would have no articulable standard. The majority opinion below found this a persuasive argument for not applying the amended

section 2 effects test to judicial elections. Pet. App. 20a-23a. Whether Congress would agree is, up to this point anyway, unknown.

The implications of a different eligible pool for judges

Judicial candidates typically must meet more onerous eligibility requirements than other types of candidates for public office. They must in Texas. *Supra* at 5. Such requirements for judges skew the proportions between the eligible pool of candidates and the eligible pool of voters to a dramatically different degree than exist for other public offices. See table, *supra* at 6.²⁵ In other statutory settings, the Court has interpreted congressional legislation to require lower courts to take eligible pool differentials into account. See, e.g., *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2121-22 (1989) (Title VII employment case). Whether Congress would adjust the effects test standard to account for this difference with judges is unknown and undebated.²⁶

²⁵ A recent social science article examining the underrepresentation of minorities in the judiciary concludes that the best indicator of the number of minority judges, both Black and Hispanic, on the bench is not the selection method; it is the number of minority lawyers in the area. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 SOC. SCIENCE Q. 315 (June 1990).

²⁶ The United States acknowledges the force of this kind of argument about the uniqueness of courts, terming the uniqueness argument "a powerful one." U.S. Br. 34, *Chisom v. Roemer*. It then relegates the concerns it raises to section 2(b)'s "totality of the circumstances" which the courts must consider in determining whether a violation has been established. There is not the slightest indication that such was Congress's intention, and, assuming that Congress properly exercised its constitutional enforcement authority by specifically addressing the circumstances it wished to legislatively correct, there is not the slightest indication that it did so. That is, it did not address the uniqueness of courts and make that uniqueness part of the totality of the circumstances to be considered; it simply did not address the matter at all.

Judicial independence and alternative voting mechanisms

HLA struggles mightily to finesse a concern about judicial independence and respect for basic state choices which arises in connection with the preferred section 2 remedy -- single member districts. It posits alternative voting mechanisms -- at-large cumulative and limited voting mechanisms -- that the court (or the parties) might use if the remedy stage of a vote dilution case were reached. HLA Br. 57-60.²⁷ HLA's concern is legitimate, and its solution may be a creative, useful one. It just happens, though, that Congress never thought about it, and Texas election law does not contemplate it. In amending section 2 in 1982, Congress left completely untouched this Court's stated preference for single-member districts as the court-ordered remedy for vote dilution violations, absent unusual circumstances. See *East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 639-40 (1976).

No court has ever upheld a trial-court imposed remedy of cumulative or limited voting in a vote dilution case. The only reported case in which such a court-ordered alternative remedy was imposed culminated in appellate reversal. See *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988) (rejecting district court-imposed limited voting remedy in at-large racial vote dilution case, in part because of its inconsistency with section 2(b)'s proviso disclaiming a section 2 right to proportional representation, *id.*, at 119-20).

²⁷ Even with the use of such alternative mechanisms in Harris County, smaller-than-countywide judicial districts or subdistricts would have been necessary.

Thus, while HLA's alternative remedy proposal may be one that Congress should consider in connection with determining whether and how judicial elections should be brought within section 2's coverage, it is not one that Congress has considered. Instead, it amended section 2 against a backdrop that included the strong single-member remedial preference, and nothing in the legislative history called the preference into question.

Constitutional freedom to appoint, instead of elect, judges

The Fifth Circuit concluded that the effects arm of amended section 2 does not reach elected state judges "for the cardinal reason that judges need not be elected at all[.]" Pet. App. 2a-3a. This rationale, in turn, rested on the court's view that an appointive state judiciary is permissible notwithstanding the guarantee in Article 4, Section 4, of the United States Constitution of a "Republican Form of Government" to the states. Pet. App. 25a-26a n.13.

Effective denial of state freedom to restructure its judiciary

Another region unexplored by congressional consideration and debate is the practical impediments section 2 "effects" coverage of judges might place on the states' otherwise wide-ranging choice of judicial selection methods. In Texas, for example, the practical result of section 2 "effects" coverage and the district court's factual analysis would be that Texas is effectively foreclosed in the foreseeable future from choosing on its own to move from an elective to an appointive judicial selection system. As chronicled in the record of the MABA appeal now pending before the Court on a jurisdictional statement, the United States attempted to prohibit even

the addition of new judgeships to the existing system. The principal reason it offered was that the existing structure violated section 2.²⁸ *Allen, supra*, made clear that section 5 of the Act covered a change in the nature of an office from elective to appointive, necessitating the Act's preclearance procedures.

Given the views articulated by the United States in *MABA*, it is clear that Texas would be unable to choose to select its judges through appointment because the United States would never preclear the choice, even though it is a constitutionally permissible one. Congress has never confronted the ramifications of this result, which, given Article 4, Section 4, of the Constitution, appears to be unique to state judiciaries.

Thus, Congress has never debated: first, the consequence of permitting federal courts, based on unintentionally discriminatory state action, to compel through section 2 the restructuring of state judiciaries; and, second, the ensuing consequence of prohibiting through section 5 the states' independent efforts to restructure their own judiciaries in otherwise constitutionally permissible ways. The subject is worthy of debate, and it is predictable that one would have been engendered -- had the subject crossed Congress's mind.

The relationship of 3-judge courts to judicial election challenges

Finally, because Congress never considered whether it was reaching judicial elections through amended section 2, it also never considered whether it should expand its three-judge court requirements to cover

²⁸ The United States even took the remarkable view that it was not bound, even in Texas, by the Fifth Circuit judgment on section 2's reach which is before the Court in this case. See Pet. App. 307a.

challenges to statewide judicial districting. Under 28 USC 2284(a), a three-judge court must be convened "when an action is filed challenging . . . the apportionment of any statewide *legislative* body." (Emphasis added). The district court in *Gingles* was a three-judge court, 478 U.S. at 35, but the one here was not. Yet, the statewide impact here was just as great, and the affected state institution at least as significant -- if not more so, from a federalism perspective. When Congress contracted the number of circumstances requiring three-judge courts, see 90 Stat. 1119, it retained § 2284(a) because the circumstances listed there "are of such importance[.]" S. Rep. No. 94-204, p. 9 (1975).

State district judges do not fit neatly into any of the categories on either side of the divide between three-judge court and one-judge court bodies, but in at least one respect, they fit the description of the kind of body intended to be covered by § 2284(a): even one district court sometimes "exercises its powers over the entire State,"²⁹ which is the Senate Report's specified condition requiring a three-judge court. *Id.* While Texas does not contend here that the federal trial court in this case lacked jurisdiction because it acted through one judge instead of three, it does seem that Congress would at least have taken note of the potential three-judge court implications of covering judges through amended section 2 had it intended to do so.

The need for unobstructed congressional debate

²⁹ The Supreme Court of Texas invalidated Texas's system of school finance. See, e.g., *Edgewood I.S.D. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). The presiding trial judge, a Travis County district judge, has announced his intention to decide by April 15, 1991, whether to cutoff all state and local funds to public schools in Texas because of the state's failure to bring the school finance system into compliance with the Texas Constitution. See *Dallas Morning News*, April 2, 1991, § A, at 1 col. 4.

Congressional reaction to the foregone debate is unknowable, but that is not the point of reciting what Congress did not do. Each of the topics raises policy implications that one side or the other in this case tries to convert to its advantage in arguing whether the effects test in amended section 2 covers judicial elections. The arguments on these points are in reality arguments over whether the effects test *should* cover judicial elections. The Court should not have to forge these difficult policy debates into debates about the meaning of amended section 2 in the context of judicial elections. Instead, it should forthrightly confront them for what they are: indicators of what Congress would have confronted had it intended to address whether elected judicial systems should be subjected to the effects test. Congress's failure to confront them is yet another demonstration that it had no intention of reaching judicial elections through the effects route.

Inapplicability of the Section 5 Analogy

HLA, LULAC, and the United States try to buttress their section 2 coverage arguments by pointing to section 5. They argue that it undeniably covers judicial elections, that it must be read in tandem with section 2,³⁰ and that therefore section 2 also covers judicial elections.

The first and obvious response is that the provisions are different provisions, with different origins, different applications, and different repercussions. Section 5, for example, has included an effects test since the passage of the original Act in 1965. Thus, whether the application of the clear statement rule for judges to section 5 would

³⁰ There is irony in this argument about the tandem nature of sections 2 and 5, given the United States' trial court position in *MABA* that section 5's prohibitions stand independent of court determination of the reach of section 2.

yield the same result -- that is, no "effects" coverage -- as the one yielded for amended section 2 would require an extensive review of the legislative history behind the original Act. Because the question of section 5's coverage of judicial elections is not before the Court in this case, such a review is unnecessary. It can await the appropriate case.

The Court's summary affirmances in section 5 cases involving elected state judges³¹ do not by any stretch of statutory construction and application of precedent lead to the ineluctable conclusion that the "effects" arm of amended section 2 covers judges. As summary affirmances, they are authority only for a rejection of "the specific challenges presented in the statement of jurisdiction." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Only the judgment of the court below is affirmed. *Anderson v. Celebrezze*, 460 U.S. 780 n.5 (1983). Thus, *Brooks* and *Haith* may have rested on assessments of whether the record below supported a finding of intentional discrimination. They could not have rested on opinions about whether the clear statement rule had been satisfied in the 1965 enactment of Section 5 and its supporting legislative history because the question was not directly presented to the Court in the jurisdictional statements.

The Court must evaluate the reach of section 2's effects test on its own terms, not on section 5's terms. The Court must look to congressional intent concerning section 2 in 1982, not to congressional intent concerning section 5 in 1965. There is time enough to evaluate section 5's reach, and the principles adopted in this case

³¹ *Georgia State Board of Elections v. Brooks*, Civ. No. 288-146 (S.D. Ga. 1989), *aff'd*, 111 S.Ct. 288 (1990) ("*Brooks*"); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) ("*Haith*").

should provide at least broad guidance in conducting that evaluation.

Other Protections for Minority Voters in Judicial Elections

Application of the clear statement rule to hold that the effects test of amended section 2 does not apply to state judicial elections would not leave minority voters unprotected in the exercise of their franchise in judicial elections. First, and most obviously, Congress could react to the ruling just as swiftly as it did to *Bolden*. With this scenario, Congress could debate and enact standards in advance of any challenge to elected judicial systems, instead of this Court having to impose them after the trial is over, with virtually no guidance from Congress on how to treat the conceded uniqueness of state judiciaries.

In the meantime, both the Constitution and the Voting Rights Act would continue to offer significant protections to minority voters in judicial elections. The Fourteenth and Fifteenth Amendments, as well as the intent prong of amended section 2, still would prohibit intentional acts of official racial discrimination against those seeking to exercise their franchise in judicial elections. The Act retains major protections for those seeking to exercise their franchise when electing judges. These protections include ballot access, inhibitions on the reinstitution of the poll tax, and preclearance of various electoral changes, including (while *Haith* and *Brooks* remain governing authority) those changes affecting judicial elections.

Conclusion: The Insufficiency of Congressional Inadvertence

The Court has applied the clear statement rule to deny extraterritorial application to a federal antidiscrimination statute whose broad terms otherwise would have reached that far. *EEOC v. Arabian American*

Oil Co., __ U.S. __ (March 26, 1991) (No. 89-1838) ("*Aramco*"). The Court held that Title VII did not regulate the employment practices of United States employers employing United States citizens abroad.

The clear statement rule, which determined *Aramco's* result, is employed "to protect against unintended clashes between [American] laws and those of others nations which could result in international discord." __ U.S. at __, slip op. at 3. Texas seeks no more than the application in this case of the analogue of the *Aramco* principle. Surely it is as important to prevent *unintended* clashes between federal laws and core state functions as it is to prevent such clashes between American laws and the laws of Saudi Arabia. In fact, there is an even stronger constitutional basis for regulating unintended clashes between federal and state governments, as the discussion above indicates.

Congressional inadvertence may not be the basis for radically and irretrievably restructuring a state judicial system that is more than a century old. Governing statutory construction principles, grounded in fundamental precepts of judicial review and federalism, require conscious congressional choice here. The choice ultimately may be for Congress to do precisely what the petitioners seek, but it must be a choice Congress confronts, not avoids. Congressional silence thus far on the question presented here means that the answer to the question must be that the effects test of amended section 2 does not apply to elected state judicial systems.

II.

TEXAS DISTRICT JUDGES HOLD SINGLE-MEMBER OFFICES, AND ELECTING THEM COUNTYWIDE IS NOT A DILUTIVE ELECTORAL PRACTICE COVERED BY AMENDED SECTION 2

This case was brought, tried, and decided under the *Gingles* framework as a vote dilution challenge to an at-large multimember electoral system. *Gingles* commands the conclusion that such challenges cannot be established under the effects test of amended section 2 when the official elected under the system is a solo governmental decisionmaker. Trial judges are solo decisionmakers, even when the electorate chooses more than one to serve the same geographical unit. Thus, regardless of whether other section 2 claims may be established against Texas's system for electing its district judges, a section 2 *vote dilution* claim may not.

The Solo Decisionmaker Argument Does Not Create An Exemption From Section 2

The petitioners mischaracterize the solo decisionmaker argument made by Texas and adopted in the five-member concurrence by Judge Higginbotham. It is not an effort to carve an exception for state district judges from amended section 2.³² It is at least conceivable that section 2 claims other than those arguing vote dilution might be established against the judicial electoral system. *But see* Part I, *supra*.

Instead of an effort to obtain a statutory exception, the solo decisionmaker argument is a demonstration that the concept of vote dilution governed by the *Gingles*

³² HLA mistakenly says it is. HLA Br. 34.

standard is not so protean that it applies to every system for electing public officials. *Gingles* recognizes the limits of its own applicability, observing that amended section 2 prohibits forms of voting discrimination other than just vote dilution. 478 U.S. at 45 n.10. It also is careful to explain that its standards are not necessarily applicable beyond the confines of vote dilution challenges to at-large multimember electoral systems. *Id.*, at 46 n.12.

Discerning the difference between the inapplicability of the vote dilution concept in this setting (Texas's argument) and the effort to carve out a wholesale exemption from amended section 2 for solo decisionmakers (the mischaracterization of Texas's argument) is crucial to this part of the case. It is a prerequisite to understanding why the countywide election of state district judges cannot violate vote dilution principles embedded in amended section 2.

District Judges Are Solo Decisionmakers

The first step in the solo decisionmaker analysis is obvious. Are the officials elected under the challenged electoral system solo decisionmakers? The answer here is easy. The district court determined that the officials targeted in this case are. The Chief Justice of the Supreme Court of Texas, himself a former Texas district judge in Harris County, testified to the solo decisionmaking nature of the office of trial judge and explained that Texas district judges engage in collegial decisionmaking only for administrative functions incidental to the performance of their judicial functions. Tr. 5-81.³³

³³ The district judges in some counties use Tex. R. Civ. P. 330 to implement a shared, or common, docket. This hardly converts the trial judges into collegial decisionmakers. In any given case, only one judge at a time decides any given issue.

In another context, the Court confirms the view of the solo nature of trial judge decisionmaking that the record in this case reflects. In *Salve Regina College v. Russell*, __ U.S. __ (March 20, 1991) (No. 89-1629), the Court contrasted the "functional components of decisionmaking" of district courts and appellate courts: "[d]istrict judges presid[ing] alone" compared to the "collaborative juridical process" and the "collective judgment" of multi-judge appellate panels.

The Connection of the Vote Dilution Concept to the Function of the Elected Office

There really being no question but that state district judges are solo decisionmakers, the other question in this analysis must be answered. What difference does it make that a vote dilution challenge is lodged against an at-large system for electing solo decisionmakers instead of one electing collegial decisionmakers? The difference lies in the origins of the concept of vote dilution and the first threshold requirement in *Gingles* for establishing an at-large vote dilution case -- whether the minority group is sufficiently large and geographically compact to constitute a majority in a single member district, 478 U.S. at 50.

The modern concept of vote dilution originated with the landmark case of *Reynolds v. Sims*, 377 U.S. 533 (1964) ("*Reynolds*"), in which the Supreme Court sustained a constitutional attack on the apportionment of the Alabama legislature. In adopting the 1982 amendments to section 2, Congress traced the lineage of racial vote dilution claims directly to *Reynolds*. See S. Rep. No. 97-417, p.196 (1982).³⁴ The interrelationship

³⁴ "The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds v. Sims*."

of the concept of vote dilution and collective decisionmaking lies at the core of the opinion's rationale:

[I]t would seem reasonable that a majority of the people . . . could elect a majority of . . . legislators. . . . Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are *collectively responsible* to the popular will.

377 U.S. at 565 (emphasis added). Sympathetic commentators have used *Reynolds* as a reference point to argue that courts assessing vote dilution claims should look beyond the casting of ballots to the decisionmaking function of those elected by the voters. See Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L.REV. 173, 180 (1989) ("Maps and Misreadings").³⁵

Texas urges a similar focus. Courts reviewing vote dilution challenges must consider the decisionmaking function of the official whose election is targeted. Another way of stating the point is that vote dilution analysis must take into account the relationship between the voters and the purpose for which they are electing their representatives. When those representatives engage in solo decisionmaking instead of collegial decisionmaking, the concept of vote dilution is inapplicable.

³⁵ The same commentator continues the same tack in a more recent article, Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L.REV. 1 (1991). She argues that a court faced with a section 2 challenge must consider whether the targeted position is one whose power is exercised by a single official and whether it is "functionally necessary" that the single official exercise it. *Id.*, at 21.

Role of the First *Gingles* Factor in the Liability Phase

Turning to *Gingles*' role in this analysis, it is clear that the paradigmatic remedy under its first threshold factor is single-member districts. See, e.g., 478 U.S. at 50 n.17 (explaining the theoretical basis for the first factor). Moreover, because the first *Gingles* factor is a threshold factor at the *liability phase* of a vote dilution case under amended section 2, it does not matter whether the remedy phase (if it is reached at all) culminates in an agreed remedy that uses alternative voting mechanisms to solve the problem or a court-ordered remedy that uses different single-member districts than the ones used to satisfy the first liability factor.

Making single-member districts the paradigmatic remedy at the liability phase and satisfaction of the first factor a prerequisite to proceeding further in the analysis means that remedy in vote dilution cases moves from the end of the line to the front of the line. The lower courts have recognized this consequence of the *Gingles* gloss on amended section 2. See, e.g., *McGhee*, *supra*, 860 F.2d at 120 (in vote dilution cases, "right and remedy are inextricably bound together"). The Seventh Circuit explains the rationale for this aspect of the *Gingles* approach:

The Court's approach, by focusing up front on whether there is an effective remedy for the claimed injury, . . . reins in the almost unbridled discretion that section 2 gives the courts[.]"

McNeil v. Springfield Park District, 851 F.2d 937, 942 (7th Cir. 1988).

Transporting the paradigmatic remedy of single member districts to the beginning of the liability phase of a vote dilution case is of fundamental significance to the

solo decisionmaker argument. To understand why, it is necessary to explain why the state retains the authority to make the initial policy choice about the basic unit that is to form the community to be governed by its elected officials.

Integrity of States' Basic Political Arrangements

The Act itself recognizes that states retain the authority to establish the basic electoral framework and the types and configurations of the communities whose voices are to be heard in the process of representative democracy. The prohibitions of section 2 reach states and their "political subdivision[s]," and the Act specifies a definition of "political subdivision," 42 USC § 1973l(c)(2). *Gingles* emphasizes that vote dilution inquiries are "district specific," 478 U.S. at 59 n.28, and Judge Higginbotham's concurrence reasons that:

It is implicit in *Gingles* that the effect of election practices must be considered after taking the underlying definition of the offices of state government as given. . . . Section 2 does not grant federal courts the authority to disregard the states' basic arrangements.

Pet. App. 103a-104a.

The recognition in the Act and *Gingles* of the states' essential authority to configure their political subdivisions into communities of representative government is consistent with the fountainhead case, *Reynolds*, which stated:

Political subdivisions of States -- counties, cities, or whatever -- . . . have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the

Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, . . . these governmental units are "created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them," and the "number, nature, and duration of the powers conferred upon [them] . . . and the territory over which they shall be exercise rests in the absolute discretion of the state." 377 U.S. at 575.

How Single Member Districts Fragment the Community Represented by Solo Decisionmakers

For over a century, Texas has chosen the county as the basic unit for electing district judges. It has used the same county unit to elect its county commissioners, who function through the commissioners court (a non-judicial body) as a collective decisionmaking body. Electing county commissioners from single-member districts does not destroy the integrity of the unit because the community living within the unit remains intact, so to speak, with each decision by the commissioners court. Electing state district judges from single member districts would destroy the integrity of the unit because each independently-made decision by the trial judge would exclude from ultimate participation all the voters in the districts not represented by the judge.³⁶

More broadly speaking, this is to say that single member districts do not alter the basic nature of collective decisionmaking bodies. At the end of the decisionmaking process, every voter of the community will have participated through his or her representative. In this way in a representative democracy, each voter's

³⁶ Judge Higginbotham's concurrence outlines an example of the exclusionary consequences of such an arrangement. Pet. App. 106a-107a.

vote counts each time a decision is made. Minority voters who otherwise might be effectively excluded from the entire process because of the submergence of their vote by a bloc of Anglo majority voters have their voice heard in each decision.

The same is not true with regard to elected solo decisionmakers, even if more than one of them is elected from the same geographic area. The imposition of a single member districting scheme on an electoral system in which more than one solo decisionmaker is elected from the same political unit to perform the same type of function results in a balkanization of the political unit. The decisionmaking becomes fragmented along the same lines as the districts into which the unit is carved. It is no longer the community's collective decisionmaking. At the end of the decisionmaking process, only a portion of the voters in the community will have participated through their elected representative. This result is antithetical to the initial choice made by the state, which under the Act and the *Reynolds* rationale is sacrosanct.

Thus, if it is apparent at the liability phase of a vote dilution case that imposition of the paradigmatic single member remedy will alter the basic nature of the elected office, then no vote dilution claim can be made out. This is Texas's solo decisionmaker argument.

Irrelevancy of Alternative Remedies

The argument is not blunted by assertions that other remedies, such as limited voting mechanisms, are available which might not splinter the basic unit of representation and governance. Only by retreating from *Gingles* can the Court assign this question to the remedy phase of the case, instead of requiring its confrontation in the liability phase. Adopting HLA's argument on this point would be inconsistent with the first *Gingles*

factor.³⁷ The Court should adhere to *Gingles* and hold that a section 2 vote dilution claim is conceptually inapplicable to an at-large system for electing solo decisionmakers.

CONCLUSION

The legitimacy of the petitioners' ultimate objectives in this case are not called into question if the Court effectively returns the issue to Congress for it to give, for the first time, serious attention to the serious issues presented when federal courts are asked to restructure something so fundamental as a state's judicial system. Congress may deploy its enforcement powers under the Civil War Amendments only after it has deliberated over a matter. There has been no congressional deliberation.

Texas urges the Court to affirm the judgment of the Fifth Circuit for the reasons set forth in this brief. Should the Court reverse the judgment, it should remand the case to the Fifth Circuit for further proceedings consistent with the Court's decision.

³⁷ Some scholarly criticism has been leveled at *Gingles*' imposition of the geographic compactness requirement as a threshold vote dilution issue. Significantly for the solo decisionmaker issue involved in this case, a central element of the criticism is its emphasis on the importance of minority representation in collegial decisionmaking bodies. *Maps and Misreadings*, *supra*, for example, stresses what it terms the "qualitative" aspect of vote dilution which should take into account the beneficial concept of "civic inclusion." Interestingly, its depiction of the values of civic inclusion make sense only in collegial decisionmaking settings. See, e.g., *Maps and Misreadings*, at 216-17 (discussing the importance of ongoing relationships among members of a representative body and of legislative coalition building).

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
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On Writs of Certiorari to the United States
Court of Appeals for the Fifth Circuit

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No. 90-813

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit**

REPLY BRIEF FOR PETITIONERS

ARGUMENT

Introduction and Summary of Argument

The argument raised in the United States' brief advances a standard for assessing vote dilution claims under §2 that was expressly rejected by Congress. The rights of minority voters cannot be subordinated to the state's interest in

continuing to use electoral schemes that exclude minority voters from meaningful participation in the electoral process.

For the following three reasons, none of the Respondents' arguments advance supportable grounds upon which this Court can deny relief to the Petitioners. First, the so-called "single-person office" principle is inapplicable to the judicial offices challenged in this case. Second, the first prong of the tripartite vote dilution test set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), does not preclude the application of §2 to the election of judges. Third, Congress exercised its enforcement powers under the 14th and 15th Amendments to cover state judicial elections under §2.

I. The State's Nonracial Reasons for the Use of At-Large Elections Cannot Outweigh a Clear Showing of Racial Vote Dilution.

A. A Vote Dilution Analysis that Requires Courts to Defer to the State's Interest in Maintaining At-Large Judicial Election Schemes Reintroduces the Intent Test Expressly Rejected by Congress in Amending §2

Although the United States agrees with the Petitioners that §2 covers the election of trial judges, it presents a new standard for assessing vote dilution claims involving the election of judges under the Act. The United States argues that a state's "strong, nondiscriminatory reasons for at-large judicial elections . . . can spell the difference between a lawful and unlawful electoral scheme."¹ U.S. *HLA* Brief at 17. In essence, the United States argues that legitimate state reasons for using a challenged election scheme may

¹Although the only question with regard to the state's interests properly before this Court is that raised by Judge Higginbotham and the Respondents -- namely, whether the state's interests may pretermitt the application of §2 to the election of judges -- the United States' argument is sufficiently troubling to merit discussion here. Judge Higginbotham's argument was discussed in our opening brief. See *HLA* Petitioners' Brief at 24-49.

constitute an affirmative defense to proof of racial vote dilution.

• This analysis radically departs from established standards for determining vote dilution under §2. No court ever has afforded controlling weight to the state's interests in a vote dilution case. Indeed, to afford such weight to the state's interests defeats the very design of §2's results test as contemplated by Congress and as interpreted by this Court, and re-imports into the vote dilution analysis the intent inquiry expressly rejected by Congress in amending the Act in 1982.

The United States argues that a state's interest in maintaining a challenged election scheme is entitled to "deference" except when "the plaintiffs can prove that the adoption or maintenance of an at-large system, whenever it occurred, was motivated by racial discrimination." U.S. *HLA* Brief at 23 n.14. The practical effect of this standard is to make all vote dilution claims turn on the plaintiff's ability to prove the illegitimacy of the state's interests.

Plaintiffs will prevail only when the state's asserted interests are, in fact, a pretext for intentional discrimination. Congress expressly rejected placing this burden upon plaintiffs.

The "totality of the circumstances" test was specifically designed to avoid an analysis of the rationale behind the use of a particular electoral structure -- even if that rationale was nondiscriminatory. Thus, Congress explicitly instructed that "the specific intent of this [§2] amendment is that the plaintiffs may choose to establish discriminatory results without proving *any* kind of discriminatory purpose." Senate Report No. 97-417, 97th Cong., 2nd Sess. (1982) at 28 (emphasis added)(hereinafter "S.Rep. at ____").

Nor did Congress give states the right to assert nondiscriminatory purposes as an affirmative defense to a vote dilution claim. In fact, Congress specifically refused to endorse the test advanced by the United States, which would permit states to assert the legitimacy of their electoral schemes to rebut the plaintiff's proof of vote dilution. *See*

Additional Views of Senator Robert Dole,² S. Rep. at 195 (rejecting suggestion that "defendants be permitted to rebut a showing of discriminatory results by a showing of some *nondiscriminatory* purpose behind the challenged voting practice or structure")(emphasis added). Instead, Congress decided that whether a challenged electoral practice was adopted or maintained for legitimate reasons is of little or no probative value to a §2 results inquiry. S. Rep. at 27 (courts need make no determination "about the motivations which lay behind" the adoption or maintenance of a proposed electoral practice).

The United States, however, now advocates a radical departure from Congress' directive. It contends that "to the extent that there are legitimate and strong state interests in the at-large election of trial or appellate judges, that is

²Senator Dole is recognized as the architect of §2(b) of the amended Act. See Boyd & Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," 40 Wash. and Lee L.Rev. 1347, 1414-1415 (1983).

powerful evidence that minority electoral failure³ is not the product of a 'built-in bias' against minorities but stems, instead, from other, neutral factors." U.S. HLA Brief at 23.

The United States' statement regarding "built-in bias" can be interpreted several ways, all of which are erroneous. To the extent that the United States uses "built-in bias" to re-import a motivational analysis into a §2 inquiry, the statement is at odds with the amended statute. Under amended §2's *results* test, it is immaterial whether plaintiffs can prove that there is "built-in bias" in the challenged electoral scheme. Thus, even if a state adduces evidence that its policy is "well-established historically, ha[s] legitimate functional purposes and was in its origins completely without racial implications," this evidence does not change a plaintiff's showing of vote dilution. *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984), *aff'd*, 478

³Petitioners have proved more than just minority electoral failure. Based on the "totality of the circumstances" Petitioners proved, and the district court found, that African American voters in Harris County "do not have an equal opportunity to participate in the electoral process and elect candidates of their choice" in district judge elections. Pet. App. at 290a-291a.

U.S. 30 (1986). Quite to the contrary, persistent minority electoral failure as a result of a confluence of "neutral factors" is the *very essence* of a §2 claim.

If the United States' reference to "built-in bias" reflects its view that a state's strong, legitimate interest in a particular electoral practice may cleanse a finding of discrimination, the statement is plainly wrong. The strength of the state's interest in a particular election scheme tells the court nothing about whether the system effectively precludes minorities from meaningful electoral participation.

No language in the statute supports the view that a state's bona fide reasons for using a particular election structure cleanses that system of discriminatory results. Section 2(b)'s terms are specific. They delineate a clear standard for claims brought under the results test. That standard is further clarified by the Senate Report, in which Congress identifies the factors most relevant to a dilution inquiry. S. Rep. at 28-29. The test, as set out in the Senate Report, "provide[s] ample guidance to federal courts"

reviewing §2 claims. S. Rep. at 16. The United States may not ignore this guidance and engraft onto the "results" test its own, contrary standard for assessing claims under §2.

There is no case law supporting the United States' argument. No court ever has refused to find liability because the strength or legitimacy of the state's interests outweighed the plaintiff's claims. In fact, in the cases relied on by Congress in developing the results test, lower courts expressly refused to immunize dilutive election schemes from challenge simply because they "satisfy some legitimate governmental goals." *Robinson v. Commisioners Court, Anderson County*, 505 F.2d 674, 680 (5th. Cir. 1974). In the relevant case law, the fundamental meaning of "built-in bias" is that despite legitimate state interests, the system *operates* to discriminate against minorities. See e.g., *Kendrick v. Walder*, 527 F.2d. 44, 49 (7th Cir. 1975).

Most disturbing, however, is the United States' contention that a state's reasons for using a challenged electoral structure can *justify* or *excuse* that system's racially

discriminatory effect. See U.S. HLA Brief at 17 (referring to legitimate "justification" for electing judges under present system); U.S. HLA Brief at 28 (arguing that although some state interests may be "insufficient to justify a racially dilutive electoral process," other interests might meet that standard). The United States' admission that, in its view, racially dilutive electoral processes may be permissible if they serve strong state interests is critically revealing. It demonstrates the United States' willingness to subordinate the rights of the intended beneficiaries of the Voting Rights Act, *even when dilution is proven*, to the interests of the state.

In several of the 23 racial dilution cases that the United States mentions as having been relied on by Congress in amending §2, jurisdictions offered their legitimate, nonracial reasons for adopting and maintaining an at-large election structure. U.S. HLA Brief at 21-22. Notwithstanding the legitimate reasons offered for the use of at-large elections in those cases, Congress decided that "even a consistently

applied practice premised on a *racially neutral policy* would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S.Rep. at 29 n.117. Instead, Congress instructed that "an aggregate of factors should be considered" in assessing vote dilution claims.⁴ House Report No. 97-227, 97th Cong., 1st Sess. (1982) at 30 (hereinafter "House Rep. at ____"). In enumerating these factors in both the Senate and House Reports, Congress never put forth the state's interest as an affirmative defense to the use of a discriminatory election scheme. *See e.g.*, House Rep. at 30; S. Rep. at 28-

⁴This conclusion was consistent with the lower court cases reviewed by Congress. In those cases the district courts recognized that "[d]ilution, as with so many complex factual determinations turns on an aggregation of the circumstances." *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973). *See also Nevett v. Sides*, 533 F.2d 1361 (5th Cir. 1976) (remanding for proper assessment of aggregate of factors); *Wallace v. House*, 515 F.2d 619, 623 (5th Cir. 1975) *vacated on other grounds*, 425 U.S. 947 (1976). Thus, although the state's interests were weighed, they were considered along with all of the other factors relevant to the existence of vote dilution, and were afforded no greater weight than other factors.

At the remedy stage, courts sought to accommodate the state's interests to the extent practicable in fashioning or approving a remedy to cure the proven dilution. *See e.g.*, *Moore v. Leflore County Board of Election Com'rs*, 502 F.2d 621 (5th Cir. 1974) (affirming the district court's rejection of a remedial plan that diluted African American voting strength and undermined legitimate state interests in equality of road mileage and land area); *Perry v. City of Opelousas*, 515 F.2d 639, 642 (5th Cir. 1975).

29. See also Brief of HLA Petitioners at 45-49.

To the contrary, when it amended §2, Congress modified the standards set out in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), for assessing vote dilution claims and explicitly eliminated, as a primary factor in a vote dilution analysis, the state's nondiscriminatory reasons for using a challenged electoral scheme. Congress decided instead that the state's rationale is relevant only as an optional factor in the *plaintiffs'* proof of discrimination.⁵ Compare *Zimmer*, 485 F.2d at 1305, and S. Rep. at 28-29. Congress identified 7 other factors that were more probative

⁵Congress identified the tenuousness of the state's policy underlying the use of the challenged electoral practice as an "additional factor that in some cases has had probative value as part of the plaintiffs' evidence" to establish vote dilution. S. Rep. at 29.

Under Congress' *results* test, the state's interests are irrelevant to proving the existence of vote dilution unless the plaintiffs attempt to prove "tenuousness" as part of their case in chief. When plaintiffs, as in this case, invite the inquiry, then tenuousness is merely one factual question as part of the totality of the circumstances that may be found in favor of the plaintiffs or the defendants. The finding that a state electoral policy is not tenuous, however, is not an affirmative defense to proven vote dilution based on an aggregate of the other, more probative, factors identified by Congress.

Congress similarly decided that the "unresponsiveness" of elected officials is not a primary factor which need be proven by plaintiffs in a vote dilution case. Compare *Zimmer*, 485 F.2d at 1305 (listing unresponsiveness of elected officials prominently among factors to be considered) and S. Rep. at 29, *supra*.

of a §2 claim than articulated state interests. The United States simply ignores Congress' instructions and develops its own test for determining vote dilution under §2.

B. *The State's Interest in Electing Judicial Candidates At-Large is Entitled to No Greater Deference than Its Interest in Electing Non-Judicial Candidates At-Large*

The United States argues that because the "role of judges differs from those [sic] of legislative or executive officials" in that "judges are expected to be fair and impartial," the State's interest in using at-large elections may be "compelling," so as to defeat a claim of vote dilution. U.S. *HLA* Brief at 22 and 24. This argument is premised on the wholly insupportable and insulting premise that the election by minority voters of judicial candidates of their choice will destroy the impartiality judiciary.

According to the United States, an election scheme in which a white majority controls the election of judges is "accountable", while a system in which an African American

majority elects some judges is "partial."⁶ Therefore, although the United States characterizes the current electoral system in Harris County, which prevents minority voters from meaningfully participating in the election of the county's 59 district judges, as one in which "all the people who may generally appear before a particular judge have a voice in the election" of that fair and impartial judge,⁷ U.S.

⁶Defendant-intervenor Wood is perhaps most candid and unabashed in articulating the concern that underlies the Respondents', Judge Higginbotham's and the United States' argument. In a revealing mischaracterization of the the petitioners' claims, Judge Wood asserts that the petitioners in Harris County seek to elect "black judges . . . accountable to black voters while other judges would be accountable to non-black voters." Brief of Respondent-Intervenor Sharolyn Wood at 43 (hereinafter "Wood Brief at ____"). Judge Wood even declares that the African American voters in Harris County advocate "*a separate but equal black judiciary serving the black community.*" *Id.* (emphasis added). What petitioners in fact seek as *voters*, not litigants, is participation in the selection of a county judiciary electorally accountable to all members of the electorate.

⁷The United States' position is ironic in that it, like that of the Respondents and Judge Higginbotham, fails to express similar concern, that minority voters and litigants under the present, purportedly "fair", system have virtually *no* opportunity to appear before judicial candidates of their choice. Judge Higginbotham, who attempts to calculate the likelihood of African American litigants in Harris County appearing before a judge elected from a "minority-dominated" subdistrict under a hypothetical 59 electoral sub-district plan, Pet. App. at 107a, never attempts to calculate the likelihood of African American litigants appearing before African American judges for whom they voted under the current system.

Of course, pointing out this irony does not address the legal flaw in the United States' argument: the right at stake is not the right of people who appear before a judge, but the right of African American voters to equal opportunity with white voters to participate in the election

HLA Brief at 23, it predicts that an alternative electoral system in which minority voters have a meaningful opportunity to participate in the election of some of the county's judges will result in a "partial" judiciary controlled by a "relatively discrete segment of the jurisdiction."⁸ *Id.*

These erroneous assumptions taint the United States', the defendants' and Judge Higginbotham's analysis, and lead them all to the same conclusion -- that the election of judges must be protected from vote dilution claims by minority voters. The irrational assumption that African American judges would not uphold the judicial oath of impartiality because they were elected by voters of their same race, however, does not warrant the creation of special rules and exceptions for determining claims involving judicial elections

of any government official.

⁸Under the United States' definition, African American voters are a "special interest group," U.S. HLA Brief at 25, while white voters are the neutral public.

under the Voting Rights Act.⁹

Moreover, the reasons offered by Texas for electing judges countywide are not unique to the election of judges. The state's rationale is, as the United States' concedes, "the reason usually given in support of at-large elections for municipal offices [namely] that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties."¹⁰ U.S. HLA Brief at 22, quoting *Wallace v. House*,

⁹Respondents make this argument even though alternative remedies, alleged by the HLA Petitioners in their complaint in intervention, could alleviate the unlawful dilution proved without the use of sub-districts. See HLA Petitioners' Brief at 57-60.

Although HLA Petitioners take issue with the State Respondents' contention that even the use of limited or cumulative voting would require sub-districting in Harris County, Brief of Respondents at 29, that argument would be most appropriately addressed at the remedial stage of this litigation.

¹⁰There is no evidence in the record indicating that Texas adopted or maintained the current method of electing judges to serve the state's interest in a "fair and impartial judiciary." To the contrary, all of the evidence in the record points to the conclusion that Texas chose to elect its judges in the same manner that it elects candidates for other elected offices simply because that was its custom and not to serve any particular or "compelling" interest related to the function of judges.

Indeed, the testimony of Respondent-Intervenor Judge Harold Entz, undermines the notion that at-large elections are necessary to preserve impartiality of judges. TR. at 4-90 (testifying that he knows of no instances in which the impartiality of Texas' Justices of the Peace, who are elected from sub-districts, has been questioned).

515 F.2d 619, 633 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976). *See also* U.S. HLA Brief at 25. These reasons are entitled to no greater weight simply because the elected office at issue is judicial. Indeed because judges are bound by an oath of impartiality no matter how they are elected, the "ward parochialism" concern is even less compelling in the context of judicial elections than it is in the context of legislative contests.

The United States' position is particularly insupportable because the HLA Petitioners did not allege a violation based on at-large elections only. Petitioners specifically challenged the *exclusionary* features of the at-large election scheme. JA. at 16a ("[d]istrict judges in Texas are elected in an exclusionary at-large, numbered place system"). The exclusionary features of the current election scheme, including the numbered post and staggered election requirements, permit the same racially homogeneous 51% of the electorate to choose 100% of the county's judges year

after year.¹¹ Because voting is highly racially polarized in Harris County, the 18% African American electoral minority can rarely, if ever, elect candidates of its choice, under this system.

The State in this case has not raised any legitimate interest in maintaining the exclusionary features of its at-large election system, nor has the State explained how these features are related to maintaining a "fair and impartial" judiciary. Neither the State nor Judge Higginbotham has explained why HLA Petitioners' proposed alternative at-large election systems, which would lower the threshold of exclusion for minority voters, would not accommodate the State's purported interest in maintaining the countywide electoral feature. Indeed, the State Respondents concede that the HLA, in proposing cumulative and limited voting as alternative electoral systems, have suggested a "creative

¹¹The Respondents' contention that petitioners have advanced a *per se* challenge to the at-large system is completely undercut by the fact that the HLA Petitioners alleged that a non-exclusionary at-large system could cure the dilutive nature of the current system. J.A. at 20a.

[and] useful" solution to curing the proven dilution.¹² Brief of State Respondents at 29.

C. *The State's Nondiscriminatory Reasons for Electing Judicial Candidates At-Large Cannot Cleanse the Proven Vote Dilution in this Case*

To follow the argument advanced by the United States, courts would have to ignore the fact that African American voters cannot effectively participate in district judge elections, simply because the current electoral scheme purports to serve the state's interest.¹³ Congress' decision to

¹²The appropriateness of a remedy is case-specific. Therefore, contrary to the State Respondents' contention, the fact that a lower court refused to uphold the use of limited voting in a particular case is irrelevant to the propriety of that remedy in the case at hand. Brief of State Respondents at 29, citing *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988). In *McGhee*, in fact, the plaintiffs limited their challenge to the "at-large" feature of elections for the County Board of Commissioners. 860 F.2d at 113. Here, HLA petitioners specifically challenged the *exclusionary* features of the at-large system and alleged that alternative at-large remedies could cure the proven violation in Harris County.

¹³Although Texas has expressed an interest in a fair and impartial judiciary, the integrity of a state's judiciary is undermined when one racial group in the community cannot participate in its selection. See, Brief of *Chisom* Petitioners at 61. It would seem logical to assume that Texas' purported interest in a fair and impartial judiciary would be served by the inclusion of minority voters in the electoral process.

end voting discrimination "comprehensively and finally," in amending the Act will not tolerate such judicial indifference to minority political and electoral exclusion. S. Rep. at 5:

Moreover, in this case the State's articulated reasons for maintaining countywide judicial elections do not negate the overwhelming evidence that racial vote dilution exists in district judge elections in Texas.

The facts in Harris County, as found by the district court, point indisputably to the existence of vote dilution. In 17 contested district judge general elections in Harris County from 1980-1988, only 2 African Americans won.¹⁴ Pet.

¹⁴Respondent-intervenor Wood simply ignores the findings of the district court and reasserts the facts offered by her expert. Many of these facts were rejected by the district court because they were of little probative value. For instance, Judge Wood asserts that the plaintiffs' expert "ignored the three 1978 district judge elections in which blacks ran -- and won -- contested races against a white candidate." Wood Brief at 8. In fact, all three African American candidates ran *uncontested* in the general election that year, although they had opposition in the primary.

Judge Wood correctly states, however, that "[t]wo of those black judges have run -- and won -- every four years since 1978. Only one of those four races was contested; therefore, Petitioners counted only that race." *Id.* Consistent with the racially polarized voting analyses approved by this Court and lower courts, Petitioners indeed focused only on contested races, specifically those in which African American candidates faced white opponents. . See e.g., *Gingles*, 478 U.S. at 52-61. See also *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989). Judge Wood's conclusions, on the other hand, are based on uncontested elections, elections involving only white candidates, and elections involving Hispanic candidates, although no

App. at 279a. African American and white candidates, even within the same political party, are elected at grossly disparate rates. Thus, 52% of white Democratic judicial candidates were elected between 1980 and 1988, while only 12.5% of African American Democratic candidates were elected.¹⁵ TR. at 3-134-135. This fact, along with the history of discrimination in the County touching upon the

claims on behalf of Hispanic voters in Harris County were advanced by any of the plaintiffs. Therefore, Respondent-Intervenor Wood's inflated figures which purport to show the success rate for African American candidates in judicial elections in Harris County was not accepted by the district court, and instead the court found the statistical evidence presented by the HLA "legally competent and highly probative." Pet. App. at 296a-297a.

As to the one contested general election referred to by Judge Wood in which the African American candidate won against a white incumbent, the results of that election only further support the plaintiffs' claims. In 1982 Judge Thomas Routt, the African American incumbent, won the general election by a bare majority over a virtual unknown. TR. at 3-162-163; TR. at 3-329. Judge Routt won with only 51.3% of the vote, and testified that keeping voters ignorant of his ethnicity assisted his slim victory. TR. at 3-206-207.

The facts found by the district court are subject to the clearly erroneous standard of Rule 52. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Furthermore, in §2 cases this Court has directed reviewing courts to defer to the local district judges' "particular familiarity with the indigenous political reality" of the State. *Gingles*, 478 U.S. at 79. Should this case be remanded to the Court of Appeals for review of the merits, the panel would be bound by these standards.

¹⁵Respondent-intervenor Wood dismisses this 40% disparity in candidate success rates between African Americans and whites within the Democratic Party as a natural result of "the vagaries of politics." Wood Brief at 44.

right of African Americans to vote, the depressed socioeconomic condition of the county's African American population, the inability of African American incumbent district judges to be elected, and the existence of extreme racial polarization in voting, support a finding of vote dilution.

D. The District Court Properly Weighed the State's Interests in this Case

The United States erroneously states that the district court "did not consider whether the State has a strong" interest in using at-large elections for judges. U.S. HLA Brief at 24. Contrary to the United States' contention, the State's interests were presented to, and carefully assessed by, the district court. Indeed 3 1/2 pages of the district court's decision are devoted to a factual analysis of the interests asserted by the State, each discussed in turn. Pet. App. at

281a - 284a.¹⁶ The court ultimately found that these interests were "not compelling." *Id.* at 283a. In particular, the district court found that the State's interests could be accommodated using one of several possible remedies.¹⁷ *Id.* at 284a.

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E. *A §2 Remedy is Directed at Curing Dilution in the Electoral Process, Not Altering the Functions Performed by Judges*

Texas' repeated assertion that applying §2 to elected judges will result in federal courts taking over from the

¹⁶The district court described the state's asserted interests as: "(1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; (2) changes in the current system would result in costly administrative changes for District Clerk's offices; and (3) the system of specialized courts in some counties would disenfranchise all voters' right to elect judges with jurisdiction over some matters." Pet. App. at 281a - 282a.

¹⁷Contrary to Respondents' assertions, weighing the state's interests at the remedy phase does not "retreat" from *Gingles*. Brief of State Respondents at 44. The first prong of *Gingles*, in which minority voters show that they are sufficiently numerous and geographically compact to constitute a majority in a single-member district, does not ask plaintiffs to propose a remedy before they prove liability. The first prong of *Gingles*, as discussed *infra* at pp. 31-33, is a demonstration of the causal relationship between the challenged electoral structure and the dilution of minority voting strength.

states the function and administration of the judiciary, fatally mistates the proper scope of the remedy inquiry and the role of the state's interests in the remedial phase of the litigation. *See* Brief of State Defendants at 19-22.

First, §2 protects the rights of *voters*, not litigants. As a result, a §2 remedy is directed at changing the *electoral* process.¹⁸ It does not, as the State Respondents suggest, "intrude into state judicial functions" or purport to change the way judges decide cases. *Id.* at 19-22.

Second, the State underestimates its own role under §2 in remedying the proven vote dilution. At the remedy phase the State, not the federal court, is accorded the first opportunity to propose an election system that affords minorities an equal opportunity to participate in the election of judges. *See* *McDaniel v. Sanchez*, 452 U.S. 130, 150

¹⁸For this reason, the Respondents' argument -- that the relevant standard for measuring minority electoral success in judicial contests is the pool of eligible minority lawyers -- fails. *See* State Respondents' Brief at 28; Woods Brief at 44-45. The Voting Rights Act does not protect the rights of minority *lawyers* to be elected as judges. It protects the rights of minority *voters* to an equal opportunity to elect the candidates of their choice.

n.30 (1981). So long as the dilution is completely remedied, the State may use its discretion in fashioning a plan to accomodate its *bona fide* interests. Indeed, so long as it cures the proven violation, the federal court must defer to the State's proffered plan. *White v. Weiser*, 412 U.S. 783, 797 (1973). Texas' exaggerated claims of intrusion by the federal court into the State's judicial system are not a necessary result of applying §2 to judicial elections.

In this case, in accordance with established remedial principles, the district court consistently expressed its preference for a State-created remedial plan, J.A. at 159a; Pet. App. at 303a. The court entered an interim order only after the Texas legislature failed to take action during its Special Session to create a remedial plan for district judge elections. J.A. at 159a-161a. The district court subsequently entered an order for an interim remedial plan to be used for the then upcoming 1990 elections *only*. *Id.* at 162a. The sub-district elections required in that plan mirrored the sub-district plan agreed upon by the State

defendants and the plaintiffs in an earlier settlement agreement.¹⁹ *Id.* The proceedings in this case demonstrate that the State, therefore, has the opportunity to act as the principal architect of a remedial plan for the election of judges, should it choose to exercise its power.²⁰ The State is not, as the Texas Respondents suggest, a powerless entity that sits on the sidelines as the federal court restructures its judicial electoral system, unless it chooses to play such a passive role.

Nor will the application of amended §2 to the state judiciary affect the ability of the states to change to an appointive system for electing judges, as Texas asserts.

¹⁹In addition, the district court's plan abolished partisan elections. Plaintiffs never challenged the partisan nature of district judge elections in the challenged counties.

²⁰As discussed in our opening brief, the State is free to propose alternative remedies that remove the exclusionary features of the current electoral scheme, such as cumulative or limited voting. The existence of alternative remedies underscores the fallacy of Judge Higginbotham's and the Respondents' premature and incomplete remedy analysis.

Nor is consideration of these alternative remedies precluded because "Congress never debated" their use. Brief of State Respondents at 31. At the remedy phase of §2 litigation "courts should exercise [their] traditional equitable powers to fashion relief so that it completely remedies the prior dilution." S. Rep. at 31. Within these parameters, courts may consider any remedies proposed by the parties.

Brief of State Respondents at 30. As a matter of law, even under the Respondents' reading of the statute, plaintiffs could challenge a State's change from an elective to an appointive system under a §2 intent analysis. House Report at 18. If they were to proceed under a *results* test, however, plaintiffs would be required, as in any §2 claim, to prove that the shift from an elective to an appointive system actually violated §2 of the Act. Even in the absence of §2, however, such a change in Texas would be covered by §5, and would require preclearance from the Justice Department. This court has consistently affirmed §5's application to the election of judges. *Georgia State Board of Elections v. Brooks*, 111 S.Ct. 288 (1990); *Martin v. Haith*, 477 U.S. 901 (1986).

II. The State's Principal Argument Rests on a Fundamentally Erroneous Definition of a Single-Person Officer

In our opening brief, Petitioners demonstrated that §2 unquestionably applies to single person offices. *See* HLA Petitioners' Brief at 35-36. Further, Petitioners showed that even if the single person office analysis may be useful in examining some electoral mechanisms, it clearly is inapplicable to this case, in which 59 judges are elected from one district. *Id.*, at 36-37.

Consistent with §2's focus on the structure of the electoral system, the only court to address squarely the issue of single member offices has held that the term has a clear and unequivocal meaning that has nothing to do with the function of the challenged office. *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518 n.19 (M.D. Ala. 1989.)²¹ Furthermore, even courts faced

²¹The *Siegelman* court stated that "the true hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller. While mayors and sheriffs do indeed 'hold single-person offices . . . , they do so because there is only one such position in the entire geographic area in which they run for election. . . . What is important

with judicial electoral structures in which several judges are elected from the same district, repeatedly have held that these structures are multimember. *See Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) *aff'd* 477 U.S. 901 (1986); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988).

The single person office principle is a descriptive, not an analytic device that has relevance, if at all,²² when a challenged mechanism has only one office holder in the entire jurisdiction. In fact, the holding of *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), so heavily relied on by the State is limited, by its express terms, to offices in which there is one officeholder per jurisdiction.

is how many positions there are in the voting jurisdiction. It is irrelevant, in ascertaining the potential existence of vote-dilution, that these officials happen to exercise the full authority of their offices alone."

²²*See*, Brief on Petition for Writ of Certiorari of United States as *Amicus Curiae* in *Whitfield v. Clinton*, No. 90-383 (*cert. denied*) (questioning the viability of *Butts* on the ground that "the [Voting Rights Act] language makes no exception for majority vote requirements, either for single member offices or other types of elected positions.") *See also*, Brief of Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* in *H.L.A. v. Attorney General of Texas*, at 26 and n.22.

Contrary to the State's assertion, nothing in *Butts* authorizes an inquiry into the challenged officeholder's decisionmaking role.²³ The fact that Texas trial judges perform certain functions alone cannot insulate these positions from §2 scrutiny. As *Amicus* the Lawyers' Committee clearly argues in its brief to this Court, Texas' application of a so-called solo decision maker theory to the challenged 59-member body is nothing more than a policy judgment that trial judges should not be elected from subdistricts. Such policy questions are never dispositive of Section 2's applicability and are clearly inappropriate at the liability phase of the proceedings.

²³In fact, examination of the functions of the challenged offices in *Butts* reveals that all of the positions involved collegial decisionmakers. See, e.g., *Morris v. Board of Estimate*, 489 U.S. ___, 103 L. Ed. 2d 717 (1989). Moreover, the challenged mechanism in *Butts* was a runoff primary law, not the at-large structure of the district. Thus the entire weight of the State's invented "solo decisionmaker exception" rests on Second Circuit dictum about an issue not before that court.

III. **Vote Dilution Can Be Measured in the Absence of the One-Person, One-Vote Requirement**

The State of Texas argues that vote dilution cannot be measured under §2 in judicial election cases because the first prong of the tripartite *Gingles* test, requiring minority voters to prove that they are sufficiently numerous and geographically compact to constitute a majority in a single-member district assumes the applicability of the one-person, one-vote rule. Brief of State Respondents at 27. In the absence of the one-person, one vote rule, the State argues, there is no articulable standard for measuring "undiluted" minority voting strength. *Id.* at 27, quoting *Gingles*, 478 U.S. at 88 (J. O'Connor, concurring).

Texas overstates the significance of the illustrative single-member district discussed in *Gingles*. In that case, plaintiffs presented illustrative maps to demonstrate that majority African American single-member districts could be created to give minority voters an opportunity to elect

candidates of their choice to the North Carolina legislature. This Court approved that demonstrative model and noted that "the single-member district is *generally* the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." *Gingles*, 478 U.S. at 50 n. 17 (emphasis added).

In Harris County, an unusually large election district in both physical size and population, plaintiffs quite easily could rely on districts used throughout the state to elect district judges as a "measure" to create illustrative districts in which minority voting strength would not be diluted. In other cases, plaintiffs may use other guides to measure minority voting strength. For example, using sub-districts to illustrate "undiluted minority voting strength," plaintiffs may draw sub-districts based on the average electoral unit used by the state to elect similar officers. For instance, in Texas, district judge districts range from populations of 20,000 to over 2 million. Many judicial districts have

populations under 50,000.²⁴ See U.S. Brief of United States at 26 n.19. Thus, petitioners in this case, demonstrated that African American voters in Harris County could constitute a majority in at least thirteen single-member districts with populations of approximately 40,000 each, a size well within the population variances tolerated by state policy.

Plaintiffs may also demonstrate, by mathematically calculating the electoral threshold of exclusion, that minority voters possess the "potential to elect" candidates of their choice under a limited or cumulative voting scheme.²⁵ In this case, where Petitioners challenge particular exclusionary features of the at-large system, such a demonstration would also constitute proof of the causal nexus between the current electoral scheme and the impairment of minority voters'

²⁴In fact, 29 state district judges are elected from districts of less than 30,000 persons. Brief *Amicus Curiae* of Mexican-American Legislative Caucus, *et al.*, filed in *LULAC v. Mattox*, Fifth Circuit No. 90-8014, at 12.

²⁵See *e.g.*, Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.-C.L.L.Rev. 173, 223-236 (1989); R. Engstrom, D. Taebel & R. Cole, "Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico," The Journal of Law & Politics, Vol. V., No. 3 (Spring 1989). See discussion in HLA Petitioners' Brief at 57-60.

ability to elect candidates their of choice.

IV. Congress Has Exercised its Enforcement Power Under the 14th and 15th Amendments to Outlaw Racial Vote Dilution in All Elections

The State of Texas posits as the central question in this case, whether Congress use its enforcement authority under § 5 of the Fourteenth Amendment or § 2 of the Fifteenth Amendment to outlaw unintentional racial vote dilution in elected state judicial systems." State Respondents' Brief at 12. The answer to this basic question is, yes.

According to the State of Texas, Congress could not have exercised its enforcement powers to outlaw racial discrimination in judicial elections unless it clearly and specifically stated that it intended to do so, *id. at 12-17*, and could not have exercised that power over judicial elections in the absence of specific fact-finding regarding racial discrimination in judicial elections. *Id. at 17-19*.

This Court specifically has held that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court upheld Congress' ban on literacy tests "even though there were no findings of nationwide discrimination in voting, let alone findings that literacy tests had been used to discriminate against minorities in every jurisdiction in the country." S. Rep. at 42. Therefore, Congress may use its Fourteenth and Fifteenth Amendment powers to "enact legislation whose reach includes [jurisdictions] without a proven history of discrimination." S.Rep. at 42.

Just as Congress did not need to document the discriminatory use of literacy tests in every jurisdiction in the country to justify the 1970 amendments to the Voting Rights Act, neither is Congress required to document racial discrimination in the election of judges, to make §2 applicable to the elected judiciary. Indeed, unlike the

prohibition upheld in *Oregon*, §2 is not a blanket prohibition against the use of a particular electoral scheme or practice. Minority voters must *prove* the existence of vote dilution in the particular election scheme used by a jurisdiction under §2. Under the totality of the circumstances, judicial election schemes are each reviewed on a case by case basis.

Moreover, facts related to minority state court judges were explicitly included in the data relied upon by Congress in amending §2. *See e.g.* House Report at 7-9; Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) at 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 1647; Hearings on S.53, S.1761, S.1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) at 208-09, 669, 748, 788, 789. Contrary to the State Respondents' claim that there is only a "meager collection of references" to the election of judges, Brief of State Respondents at 25, the legislative history of

the amended Act contains numerous references in the hearings²⁶ to discrimination in judicial elections and the importance of increased minority participation in the state elected judiciary. These references, exhaustively cited and discussed in the Amicus Brief of the Lawyers' Committee for Civil Rights Under the Law, *et al.*, at 14-19, critically undermine the Respondents' argument.

Most importantly, Congress was satisfied that the need for amended §2 had been "amply demonstrated." House Report at 31. The House and Senate Report, as well as the volumes of testimony in the legislative history attest to Congress' "deliberation" in amending §2 to serve as "the major statutory prohibition of *all* voting rights discrimination." S. Rep. at 30 (emphasis added). This statement of purpose expresses Congress clear intention to cover racial discrimination in all elections, including those for state judges.

²⁶The House and Senate hearings held in 1981 and 1982 represent Congress' fact-finding in amending the Act.

In light of Congress' repeated insistence that amended §2 of the Act, covers *all* elections, *see e.g.* language of §2(a) and §14(c)(1), it is incumbent upon the Respondents to demonstrate Congress' clear intention to *exclude* judicial elections from the Act in 1982. The only offer of proof made by the defendants and the Fifth Circuit in this regard is the use of the word "representatives" in §2(b) of the Act. For the reasons incorporated by reference in our opening brief, the use of the word "representatives" in §2(b) of the Act does not warrant the exclusion of elected judges from the scope of the amended Act. *See Chisom* Brief at 41-42.

Congress' reasons for amending the Act are clear. They are expressly set out at page 2 of the Senate Report in a section appropriately titled "Purpose." None of those reasons relate to the exclusion of elected judges from coverage under §2 of the Act. Congress' only purpose with regard to §2 was "to amend the language . . . in order to clearly establish the standards intended by Congress for proving a violation of that section." S. Rep. at 2. Even the

Fifth Circuit agrees that the Act, prior to amendment in 1982, covered judicial elections, *see* Pet. App. at 26a-28a. Congress' stated purposes in amending the Act does not mention excluding electing judges from §2, therefore, the defendants cannot justifiably argue that Congress either purposefully or inadvertently excluded judges from the scope of amended §2.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below and remand the case for determination of a proper remedy.

Respectfully submitted,

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In the Supreme Court of the United States OFFICE OF THE CLERK

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASS'N, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF TEXAS, ET AL.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,
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v.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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QUESTIONS PRESENTED

1. Whether the results test of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, applies to the election of state court judges.

2. Whether the results test of Section 2 of the Voting Rights Act of 1965 applies to the election of offices that can be held by only one person.



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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-813

HOUSTON LAWYERS' ASS'N, ET AL., PETITIONERS

v.

THE ATTORNEY GENERAL OF TEXAS, ET AL.

No. 90-974

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,
PETITIONERS

v.

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*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL**

INTEREST OF THE UNITED STATES

This case, like *Chisom v. Roemer*, No. 90-757 (consolidated with *United States v. Roemer*, No. 90-1032) involves the application of the vote dilution analysis of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, to state judicial elections. The United States has the primary responsibility for enforcing Section 2, and the decision of the Court in this case will have an im-

portant effect on federal enforcement efforts. In addition, the Attorney General is responsible under Section 5 of the Voting Rights Act for preclearing voting changes, and under existing regulations must withhold preclearance if he concludes that such action "is necessary to prevent a clear violation of amended section 2." 28 C.F.R. 51.55(b)(2). This decision therefore will affect the manner in which the government reviews proposed voting changes in judicial election procedures under Section 5. The United States filed an *amicus curiae* brief when the case was heard by the panel and the en banc court, and presented oral argument to the en banc court.

STATEMENT

A. The Structure Of The Texas Judicial System

1. *District courts.* Texas district courts are the State's trial courts of general jurisdiction. Tex. Const. Art. 5, § 8; see generally Tex. Judicial Council, *Texas Judicial System: 61st Annual Report* 10-17 (1989) [hereinafter *Judicial Report*]. The Texas legislature creates district court seats as the need arises, assigns the seats individual numbers, and defines the geographic area that they are to encompass. Tex. Gov't Code Ann. § 24.101 *et seq.* (Vernon 1988). With one exception, all of the district court seats at issue in this case encompass single counties.¹ A 1985 amendment to the Texas Constitution allowed redistricting, on the approval of the voters, of district court seats into districts consisting of portions of counties. Tex. Const. Art. 5, § 7a(i).²

District court judges are elected to office for four-year terms through at-large, countywide elections. Candidates

¹ The 72nd Judicial District encompasses Lubbock and Crosby counties. See Tex. Gov't Code Ann. § 24.174 (Vernon 1988).

² Although Art. 5, § 7a(i) permits voters to create subcounty districts, it is not clear whether a court so created could still exercise county-wide authority.

run for numbered seats in partisan contests. Tex. Const. Art. 5, § 7a(i). While party primaries require a majority of votes to be nominated, the general election requires only a plurality to win. Tex. Election Code § 172.003 (Vernon 1986). Interim district court vacancies are filled by gubernatorial appointment. Tex. Const. Art. 5, § 28. See generally 90-813 Pet. App. 190a-191a.

The jurisdiction of Texas district courts is statewide, while venue (*i.e.*, the designation of which court with competent jurisdiction should hear a case) is determined by county. See *Nipper v. U-Haul Co.*, 516 S.W.2d 467, 470 (Tex. Civ. App. 1974).³ The venue rules regarding the county in which a case should be filed are defined by general laws, see Tex. Civ. Prac. & Rem. Code Ann. § 15.001 (Vernon 1986); Tex. Code Crim. Proc. Ann. Art. 13.10 *et seq.* (Vernon 1977), or by the mandatory or permissive provisions of particular statutes, see, *e.g.*, Tex. Civ. Prac. & Rem. Code Ann. §§ 15.011-15.040 (Vernon 1986); see generally 72 Tex. Jur. 3d Venue §§ 1-99 (1990).

District courts conduct proceedings at the county seat of the county in which the case is pending. Tex. Const. Art. 5, § 7. Jury selection, case assignment, and record retention are handled on a countywide basis. See, *e.g.*, 3 Tr. 267; 4 Tr. 255-256 (lawsuits in Harris County are filed at a central intake division and are randomly assigned to a district court, as are county residents reporting for jury duty), 4 Tr. 144 (Dallas County). Administrative coordination extends across counties as well. District court judges are sometimes assigned to hear cases in district courts in other counties, 5 Tr. 120, and

³ *Nipper* held that the Travis County district court had jurisdiction over a claim arising in Bexar County, and that the parties, both of whom lived in Bexar County, had waived their venue right to have the case transferred to Bexar County. See also *Jernigan v. Jernigan*, 467 S.W.2d 621 (Tex. Civ. App. 1971) (drawing same distinction between jurisdiction and venue).

this practice has been upheld against the challenge that judges have jurisdiction only in their own counties. *Reed v. State*, 500 S.W.2d 137, 138 (Tex. Crim. App. 1973). Under Texas law, the district courts of the State are divided into nine multicounty administrative judicial regions. See Tex. Gov't Code Ann. § 74.042 (Vernon 1988). The presiding judge of each region is granted authority to promulgate regional rules of administration, advise judges on case flow management, recommend organizational changes to the Supreme Court, and oversee the assignment of judges within and between regions. *Id.* §§ 74.046-74.060.

2. *Specialized subject matter jurisdiction courts.* Although the state legislature cannot restrict the constitutional jurisdiction of district courts,⁴ laws containing new district court seats often express the intent that the judges elected to these posts give preference to certain types of matters. In this manner, the legislature has instructed certain district courts to give preference to family law matters, criminal matters, civil cases, or some combination of these areas, and some others appear to possess an informally designated subject-matter specialty. *Judicial Report* 17-19. Specialty courts are generally employed in populous, metropolitan counties. *Id.* at 10-11. Since these counties have many district courts, subject-matter preferences can be allocated among district court judges so that relatively large numbers of seats are assigned to each specialty.⁵

⁴ See, e.g., *Lord v. Clayton*, 163 Tex. 62, 67, 353 S.W.2d 718, 721-722 (1961); *Ex parte Richards*, 137 Tex. 520, 155 S.W.2d 597, 599 (1941).

⁵ According to the most recent report of the Texas Judicial Council, the 59 district court seats in Harris County are assigned subject matters as follows: 31 courts have general district court jurisdiction or a civil preference; 16 courts have preference for criminal cases; and 12 courts specialize in family law. *Judicial Report* 54. The 37 seats in Dallas County are divided as follows: 13 courts have general district court jurisdiction or a civil preference; 15 courts are

3. *Other courts.* There are 14 intermediate courts of appeals providing appellate review of the judgments of the district courts. Each such appellate court has between 3 and 13 justices, all of whom are elected in partisan elections from geographic districts. *Judicial Report* 10-11. The jurisdiction of these appellate courts is "co-extensive with the limits of their respective districts." Tex. Const. Art. 5, § 6. The two courts of last resort in the State, the Supreme Court and the Court of Criminal Appeals, have nine justices each, all of whom are elected in statewide at-large partisan elections. *Judicial Report* 10.

The Texas system also includes county courts, municipal courts, and justice of the peace courts. Justices of the peace are elected from "commissioner's precincts," which divide each county into between four and eight subdistricts. Tex. Const. Art. 5, § 18. In larger counties, more than one justice of the peace may be elected from each commissioner's precinct. *Ibid.* The Texas courts have held that justices of the peace have countywide territorial jurisdiction despite their election from individual precincts. See, e.g., *Zulauf v. State*, 591 S.W.2d 869, 872 & n.5 (Tex. Crim. App. 1979); *Bradley v. Swearingen*, 525 S.W.2d 280, 282 (Tex. Civ. App. 1975).

assigned a criminal preference; and 9 courts are designated as family courts or assigned a family law preference. *Id.* at 45. Tarrant County has 11 courts with general jurisdiction or a civil preference; 11 courts with a criminal preference or designation; and 7 courts with a family law preference. *Id.* at 76. Jefferson County has 4 courts of general district court jurisdiction; 2 courts handling criminal matters; and 2 courts handling family law. *Id.* at 58. One of Travis County's 13 district court judges is assigned a criminal preference, *id.* at 78, and one of Midland County's three courts is designated as a family court, *id.* at 66. Ector and Lubbock Counties do not use specialized courts. *Id.* at 48, 63.

B. The Proceedings In This Case

The plaintiffs, black and Hispanic voters residing in nine Texas counties,⁶ filed this suit on July 11, 1988, alleging that the use of an at-large election scheme to elect state district court judges in these counties diluted the voting strength of black and Hispanic voters, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. After a bench trial, the district court found that the plaintiffs had proved violations of Section 2 in each county. See Pet. App. 183a-304a.

1. *The district court's decision.* At the outset, the district court held that Section 2 applies to the election of judges. The court rejected the State's argument that Section 2 does not apply to the election of trial judges since trial judges act individually, not collegially. Relying on the Fifth Circuit's decision in *Chisom v. Edwards*, 839 F.2d 1056, cert. denied, 488 U.S. 955 (1988) (*Chisom I*), the court held that Section 2 applies to all judicial elections. Pet. App. 289a & n.32.

The court then applied the vote dilution test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to analyze plaintiffs' claims. The court found that plaintiffs had shown, in each county, (1) the existence of a minority group (black, Hispanic, or both) of sufficient size and geographical compactness to constitute a majority in a single-member district; (2) political cohesiveness within

⁶ These nine counties are: Harris County, which has a population of more than 2,400,000 and chooses 59 district court judges in at-large elections; Dallas County, which has a population of more than 1,500,000 and elects 37 judges at-large; Tarrant County, which has more than 860,000 people and elects 23 judges at-large; Bexar County, whose population of nearly 1,000,000 chooses 19 judges in at-large elections; Travis County, which elects 13 judges and has a population of nearly 420,000; Jefferson County, which has 8 judges and more than 250,000 people; Lubbock County, with 6 judges and more than 211,000 people; Ector County, with 4 judges and more than 115,000 people; and Midland County, whose 82,000 plus residents elect 3 judges at-large. 90-813 Pet. App. 200a-209a. Hereinafter we will use "Pet. App." to refer to the petition appendix in 90-813.

that minority group; and (3) racial bloc voting by the white majority that had consistently defeated the preferred candidates of the minority group. Pet. App. 289a-301a; see *id.* at 210a-273a. The court also found relevant three other factors drawn from the Senate Judiciary Committee Report accompanying the 1982 amendments to the Voting Rights Act, see S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982) [hereinafter Senate Report]: the effects of past discrimination on minorities in Texas and the historical domination of the Texas judicial system by whites; use of numbered posts and a majority vote requirement in primaries; and the large size of five counties (Harris, Dallas, Tarrant, Bexar, and Travis). Pet. App. 273a-277a. The court also noted that minorities had not enjoyed electoral success since 1980. *Id.* at 279a-281a.

The State maintained that at-large elections were necessary for several reasons: Judges elected from areas smaller than the existing county-wide districts would be susceptible to influence by organized crime and special interest or political groups; the at-large system had administrative advantages that would be lost if courts had less than county-wide jurisdiction; and modifying the present at-large system would be unduly costly. Pet. App. 281a. The State also maintained that judges should be elected from the same area in which they exercised their primary jurisdiction, and that members of the electorate would be disenfranchised in counties that used specialized courts if persons could not vote for judges who exercise each type of subject matter jurisdiction. *Id.* at 281a-282a.

The district court found none of these arguments persuasive. It concluded that jury selection and other administrative functions could still be handled centrally on a county-wide basis, Pet. App. 284a, and that no compelling state policy required specialty court designations to be retained, *id.* at 283a-285a.⁷ In sum, the court

⁷ The district court also rejected the State's defense that partisan politics and not race explained the results of elections in counties

found, based on the totality of the circumstances, that the plaintiffs had proved a violation of Section 2. *Id.* at 300a-301a.⁸

2. *The court of appeals' decision.* The defendants appealed, and the en banc court of appeals reversed by a divided vote. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (*LULAC*) (Pet. App. 1a-182a).⁹ The court held that although Section 2 generally applies to judicial elections, the vote dilution test of Section 2(b) does not, because judges are not "representatives" under Section 2(b) or as a general matter. Pet. App. 14a-35a.

The court noted that the concept of minority vote dilution was modeled on the vote dilution standards developed in "one-person, one-vote" cases and that by 1981 numerous federal court decisions, including one by this Court—*Wells v. Edwards*, 409 U.S. 1095 (1973), summarily aff'g 347 F. Supp. 453 (M.D. La. 1972) (three-judge court)—had ruled that "the judicial office is not a representative one, most often in the context of deciding

where political party primaries were not the impediment to minority electoral success. Because the court of appeals held that judges are exempt from the results test of Section 2, it did not address this issue.

⁸ In January 1990, the district court entered an order postponing upcoming elections until November 1990 in order to give the Texas legislature additional time to enact its own remedy. The court of appeals thereafter stayed the district court's order, permitting the elections to go forward.

⁹ A panel also initially reversed the district court's judgment. *League of United Latin American Citizens Council No. 4434 v. Clements*, 902 F.2d 293 (5th Cir. 1990). The majority held that Section 2 of the Voting Rights Act applies to the election of judges, 902 F.2d at 295-303, but that the results test of Section 2 does not apply to Texas trial judges, since they occupy "single person" or "single member offices," *id.* at 303-308. Judge Johnson dissented. He agreed with the majority that Section 2 applies to judicial elections, but he did not believe that trial judges in Texas hold "single member offices." *Id.* at 309-321. The court then decided to rehear the case en banc. 902 F.2d 322 (1990).

whether the one-man, one-vote rubric applied to judicial elections." Pet. App. 16a; *id.* at 16a n.9 (collecting cases). Applying the canon of construction that Congress is presumed to be aware of and endorse "the uniform construction" placed on a term, *id.* at 24a, the majority determined that Congress used the term "representatives" in order to apply the new results test of Section 2 to elections for representative, political offices but not to vote dilution claims in judicial contests. *Id.* at 16a-27a. The majority found unpersuasive the fact that the definitional provision of the Act, 42 U.S.C. 1973l(c)(1), defined "voting" by reference to "candidates for public or party office," because the term "representatives" in Section 2 was more specific. Pet. App. 27a-29a. Because Section 5 of the Voting Rights Act does not use the word "representatives," the majority also found irrelevant the fact that Section 5 applies to judicial elections. Pet. App. 29a.

Six members of the en banc court, in three separate opinions, concluded that the dilution test of Section 2 applies to judicial elections. Judge Higginbotham, joined by three other judges, concluded that the term "representatives" encompasses elected judges. Pet. App. 51a-90a. He nevertheless concluded that the at-large election of trial judges in Texas does not violate Section 2 since each trial judge, like each governor, occupies a so-called "single member office" whose electorate cannot be further subdivided. In such instances, he said, electing all trial judges on an at-large basis does not dilute minority voting strength. *Id.* at 90a-114a. Concurring specially, Chief Judge Clark said that he agreed with Judge Higginbotham, adding that vote dilution analysis might be appropriate when a State elects its judges from single-member districts. *Id.* at 36a-46a. Judge Johnson dissented. In his view, the Section 2(b) vote dilution test applies to judicial elections, and the "single member office" exception did not apply to district court judges in Texas, because there were multiple officeholders at that level. Pet. App. 115a-182a.

SUMMARY OF ARGUMENT

A. The results test of Section 2 of the Voting Rights Act of 1965 applies to the election of state court judges. The original version of Section 2 of the Voting Rights Act covered the election of judges, and the amended version of Section 2 did nothing to change that. Congress did not amend the law to shorten its reach; instead, Congress revised Section 2 to enact the "results" test that this Court had rejected in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Thus, amended Section 2, like its predecessor, covers every election for public office.

The Fifth Circuit erred in ruling that the term "representatives" in Section 2(b) exempts the election of judges from the results test of the statute. The legislative history of the 1982 amendments does not indicate that Congress used that term in order to limit the scope of Section 2. Congress used that term interchangeably with "candidates" and "elected officials" to refer to those elected to public or party office. The "one person, one vote" line of decisions holding that judges are not representatives is inapplicable here, since racial vote dilution differs from geographic vote dilution.

B. The "single member office" doctrine is inapplicable to this case. That doctrine recognizes that a minority cannot prove a case of vote dilution when there is only one person who can hold a unique office. District court posts in Texas, however, are not unique. Each office is identical to every other such office. It is immaterial that each judge holds an office separately designated as a specific district court, because there is no functional difference between the differently enumerated district courts.

C. The courts must consider a strong, nondiscriminatory state interest among the "totality of circumstances" under Section 2. This Court in *Whitcomb v. Chavis* and the Fifth Circuit in *Zimmer v. McKeithen* endorsed consideration of this factor. Although it does not "trump" proof of vote dilution, such an interest can spell the difference between a finding of unlawful vote dilution and

a lawful state electoral practice. In this case, the district court did not apply the correct legal standard to the facts, so the case should be remanded for further proceedings.

ARGUMENT

THE RESULTS TEST OF SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 APPLIES TO THE ELECTION OF TEXAS DISTRICT COURT JUDGES

A. The Amended Version Of Section 2 Applies To The Election of State Judges

The district court found that the Texas at-large system of electing trial judges violates Section 2 of the Voting Rights Act under the standard that this Court applied in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The Fifth Circuit concluded that the Section 2 results test does not apply to judicial elections and therefore had no occasion to address the correctness of the district court's application of *Gingles* to the facts of this case. The questions, then, are whether the results test of Section 2 applies to judicial elections and, if so, how that test applies in such a case.

In *Chisom v. Roemer*, No. 90-757 (consolidated with *United States v. Roemer*, No. 90-1032), we have taken the position that the results test of Section 2 applies to the election of state judges.¹⁰ As we explain in our brief in that case, the original version of Section 2 of the Voting Rights Act of 1965 covered the election of judges, and the amended version of Section 2 also applies to judicial elections. Congress did not amend that statute to shorten its reach; instead, Congress revised Section 2 in order to enact the "results" test this Court rejected in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In addition, the Fifth Circuit erred in ruling that the term "representatives" necessarily excludes elected judges. That term is best read to include all elected officeholders,

¹⁰ We have provided a copy of our brief in Nos. 90-757 & 90-1032 to counsel in this case.

whether in the legislative, executive, or judicial branch. For these reasons, the Section 2 results test applies to the election of state judges.

B. The Election Of Texas District Judges Is Not Exempt From The Section 2 Results Test On The Ground That District Judges Occupy "Single Person Offices"

In the Fifth Circuit, respondents argued that, even if Section 2 generally applies to judicial elections, district judges in Texas should be exempt from the Section 2 results test. Each district judge acts independently of every other judge, respondents argued, unlike an appellate judge, who is but one of several members of a collegial decisionmaking body, like a state legislature or a city council. Texas district judges, according to respondents, occupy what has been termed a "single person" or "single member office," to which a vote dilution claim is inapplicable. Several members of the court of appeals found that argument persuasive and would have reversed the district court's judgment on that ground. See Pet. App. 90a-114a (Higginbotham, J., concurring in the judgment). That conclusion, we believe, is mistaken.

The "single member office" exception is less an exception to the Section 2 results test than it is a limitation on the ability of vote dilution theory to provide a useful means of analyzing and challenging the at-large election of offices that are held by only one person. Vote dilution theory has been used as a means of proving that an electoral scheme can dilute the collective voting strength of minority groups even though individual minority voters are free to cast ballots that are given the same weight as the ballots cast by the members of every other group in the community. As the Court explained in *Thornburg v. Gingles*, a successful challenge to an at-large system depends on proof that a politically cohesive minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Otherwise, a minority group's electoral failure

does not necessarily signify that minority votes have been effectively cancelled out. *Gingles* also made clear that minority voters cannot claim to have been injured by a particular electoral structure, procedure, or practice (such as the use of an at-large election) unless minority voters have the potential to elect representatives in the absence of the challenged voting device. For example, if a minority group has the ability to elect legislators from single-member districts, but has been unable to do so in an at-large system, the group can challenge the State's use of an at-large system on the ground that it dilutes the votes of the minority group. A violation can be remedied by redrawing the geographic boundaries of the at-large system into single-member units. But if a minority group is dispersed throughout the districts, that group lacks the ability to elect representatives in a single-member system, and the at-large nature of the electoral system cannot be said to dilute minority votes. See *id.* at 50-51 & n.17.

The vote dilution theory recognized in *Thornburg v. Gingles* cannot be applied to the at-large election of an office that is occupied by only one person to represent the entire district. In that event, a minority group, by definition, is *not* "sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Under those conditions, it is not the at-large nature of a system that causes the dilution of minority votes, but the decision to elect only one person to the office involved and the impossibility of subdividing the one office into components. The vote dilution theory endorsed in *Thornburg v. Gingles* does not extend so far as to invalidate the use of such offices by requiring, for example, multiple governors or mayors.

The decision in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986), illustrates the "single person office" concept. *Butts* involved a Fourteenth Amendment and Section 2 challenge to a New York law requiring run-off primary elections

if no candidate received 40% of the vote for the positions of mayor, city council president, and comptroller, each of which were held by only one person. The court held that the challenged law did not improperly dilute the votes of minorities because dilution principles governing election to multimember bodies, such as a city council, do not apply to single-member offices, like mayor, because "[t]here can be no equal opportunity for representation within an office filled by one person." 779 F.2d at 148. When elections are held for a multimember body, a minority group has the opportunity to secure "a share of representation" equal to other groups of citizens by electing members from districts in which the minority is dominant. But because "there is no such thing as a 'share' of a single-member office," the Second Circuit stated, vote dilution theory cannot be applied in the case of offices that govern the entire electorate and that are held by only one person. *Ibid.* See also *United States v. Dallas County Comm.*, 850 F.2d 1430, 1432 n.1 (11th Cir. 1988) (relying on *Butts v. New York* to hold that the at-large election of a single probate judge is permissible). Cf. *City of Port Arthur v. United States*, 459 U.S. 159 (1982) (striking down run-off requirement for seats on multimember city council without mentioning the run-off requirement for mayor). Compare *Dillard v. Crenshaw County*, 831 F.2d 246, 251-252 (11th Cir. 1987) (chair of county commission was not treated as a single-member office); *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518-520 (M.D. Ala. 1989) (single-member office principle is inapplicable to elected Alabama circuit and district judges).¹¹

¹¹ In *Butts*, the court of appeals held that a plurality vote runoff requirement for a single-person office was not subject to Section 2. 779 F.2d at 151. In our view, the method of electing a single-member office is not immune from attack under Section 2; minority voters should be able to challenge hurdles to success other than the at-large structure of an election.

Of course, it is theoretically possible to eliminate a single member office by creating a new office that can be occupied by independent officeholders either simultaneously or on a rotating basis. See Note, *Applying Section 2 of the Voting Rights Act to Single-Member Offices*, 88 Mich. L. Rev. 2199 (1990) (endorsing that proposal). The Voting Rights Act, however, does not reach that far. As Judge Higginbotham wrote, the Act does not require the States to restructure their elected positions, Pet. App. 90a-91a; instead, it guarantees minorities the same "opportunity" as other members of the electorate "to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Section 2 expressly disavows any requirement of proportional representation for minority groups, and Congress made clear that the Act does not prohibit all use of at-large systems. See Senate Report 2, 16, 31-33, 68. See also *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (upholding an at-large system over a racial vote dilution claim); *id.* at 156-160 (holding that multimember systems are not per se unconstitutional); *White v. Regester*, 412 U.S. 755, 765 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973), *aff'd* on other grounds *sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (stating that at-large systems are not per se unconstitutional), *cited at* Senate Report 33. Accordingly, the vote dilution theory of *Thornburg v. Gingles* does not invalidate single member offices.

The single member office principle, however, only applies to a narrow category of elected offices: ones for which the electoral district cannot be subdivided because only one official is elected from a geographic region. That principle, accordingly, does not apply in this case, given the structure of the Texas district court system. Each county elects between 3 and 59 district court judges; none elects only one. Nor does each district judge have unique responsibilities; all have the same authority and exercise the same responsibility. Some judges specialize

in criminal, civil, or family law cases, but each district court within each county is interchangeable with every other office, and courts with the same specialization are entirely fungible. Under these circumstances, the Texas electoral system in each county can be subdivided into separate units without having to perform surgery on the functions performed by the office of district court judge. The single member office barrier to the application of the Section 2 vote dilution analysis does not exist in this case.

Judge Higginbotham concluded that a function of the office of district judge is to represent the entire community, and that creating subdivisions within counties would thus alter the nature and function of that office. Pet. App. 103a-112a. But if that analysis were correct, no at-large election to a multimember body could ever be successfully challenged under Section 2, because every State could maintain that it is the function of each officeholder to represent the entire community. That proposition may be true, but it is also largely immaterial to the question of *coverage*. Rather, it is an interest to be considered under the "totality of circumstances." What is pertinent is whether the functions that an office is empowered to carry out under state law are unique, not whether an officeholder can be said to represent a particular geographic community when exercising the power of his office. The district courts in this case are not unique, and the single member office doctrine thus does not apply.

Respondents also maintained below that district judges occupy single member offices because each judge is elected from a separate numbered district. Although it is true that district judges are technically elected to different judicial districts, each district in a county is identical to every other district. The designation of a judge as sitting for a particular numbered judicial district thus does not affect the nature of the position that judge holds, and therefore is of no consequence to the Section 2 analy-

sis. For example, by designating 59 judicial districts in Harris County, all of which cover the same geographic area, Texas has just identified different numbered posts for election purposes, thereby allowing candidates to run in head-to-head contests. That designation does not give rise to a "single person office" for purposes of Section 2 because it does not affect the nature of the office itself.

C. A State's Strong, Nondiscriminatory Reasons For At-Large Judicial Elections Are Among The "Totality Of Circumstances" That Courts Must Consider In Determining Whether There Has Been A Violation Of Section 2

Texas maintains that the at-large election of district judges helps ensure that they are responsive to the community while at the same time lessening the risk that they will be susceptible to undue influence by particular components of it. We disagree with respondents that this justification is sufficient automatically to exempt judges from Section 2, but we believe that such a justification is a legitimate one and must be considered by the courts among the "totality of circumstances" in applying Section 2. 42 U.S.C. 1973(b). In some instances, that interest can spell the difference between a lawful and unlawful electoral scheme. Since the district court did not apply the correct legal standard to the facts, the judgment should be vacated and the case remanded for further proceedings.

- 1. A "strong state policy divorced from racial discrimination" supporting at-large judicial elections is a "circumstance" for the courts to consider in determining whether Section 2 has been violated**

Historically, electoral schemes were initially challenged on the ground that the malapportionment of representatives effectively diluted the votes of individual electors. *Reynolds v. Sims*, 377 U.S. 533 (1964). An at-large election can remedy that problem, but also can lead to a

different one, group vote dilution. Group vote dilution occurs when the practical operation of an electoral system effectively erases or minimizes the voting strength of a particular group, such as a racial minority. *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). To prove that an at-large electoral system dilutes minority votes, a plaintiff must "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White v. Regester*, 412 U.S. at 766. See also *Whitcomb v. Chavis*, 403 U.S. at 149-153.

In *Zimmer v. McKeithen*, the Fifth Circuit distilled from this Court's decisions in *Whitcomb* and *White* a list of factors for the courts to use when analyzing a racial vote dilution claim. 485 F.2d at 1305. The later significance of the Fifth Circuit's discussion merits lengthy quotation, *ibid.* (footnotes omitted):

The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb v. Chavis*, *supra*, would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the un-

responsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.

The Fifth Circuit and other courts relied on what became known as the "*Zimmer* factors" in the vast majority of subsequent cases. *E.g.*, *David v. Garrison*, 553 F.2d 923, 927 (5th Cir. 1977). The Senate Judiciary Committee Report accompanying the Voting Rights Act Amendments of 1982 noted that fact, Senate Report 23, and endorsed that approach to the resolution of Section 2 claims, Senate Report 27-30. The Report also set out a list of "[t]ypical factors" that a plaintiff could invoke to prove racial vote dilution, *id.* at 28-29, that was "derived from the analytical framework used by th[is] Court in *White*, as articulated in *Zimmer*." *Id.* at 28 n.113. See *Thornburg v. Gingles*, 478 U.S. at 44-45.

One factor expressly mentioned in *Zimmer* was whether "the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination." 485 F.2d at 1305. The Fifth Circuit in *Zimmer* believed—correctly, in our view—that this Court had endorsed that factor in *Whitcomb v. Chavis*. 485 F.2d at 1305 (citing *Whitcomb*). The Fifth Circuit often reiterated that factor in later cases, although it did not rely on it to uphold an at-large electoral scheme.¹² Nevertheless, for several reasons, we believe

¹² See *Turner v. McKeithen*, 490 F.2d 191, 194 (5th Cir. 1973) ("the strength of the state interest in multi-member or at-large voting"); *Robinson v. Anderson County Comm'rs Court*, 505 F.2d 674, 680 (5th Cir. 1974) (considering and rejecting justification for apportionment; "the mere fact that an apportionment plan may

that strong state policies underlying the at-large election of judges are factors that the courts must consider in determining whether such a system violates Section 2.

First, the text of Section 2 requires the courts to consider the "totality of circumstances" when analyzing a Section 2 claim. This Court has recognized that the State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry, see *Whitcomb v. Chavis*, 403 U.S. at 149, while the Fifth Circuit in *Zimmer* expressly approved the use of this particular factor in the balance of considerations. 485 F.2d at 1305. The Senate Report on the 1982 Amendments favorably cited *Whitcomb* and *Zimmer* when discussing how amended Section 2 would operate. See Senate Report 24-33.

Second, Section 2 applies to all state electoral mechanisms, not simply the use of at-large elections. For instance, a state law requiring a person to be a member of the state bar for a set number of years before becoming a judge could conceivably be challenged on the ground that it dilutes the pool of candidates for the bench. For that matter, a rule that the candidate with the most votes wins could conceivably be challenged on the ground that it prevents minority groups from electing a representative to a single-member office, like governor. If so, it would be odd in the extreme for Congress to have prevented the

satisfy some legitimate governmental goals does not automatically immunize it from constitutional attack on the ground that it has offended more fundamental criteria"); *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109, 1112 (5th Cir. 1975) (quoting *Turner*); *David v. Garrison*, 553 F.2d 923, 927, 930 (5th Cir. 1977); *Parnell v. Rapides Parish School Bd.*, 563 F.2d 180, 184 (5th Cir. 1977); *Bolden v. City of Mobile*, 571 F.2d 238, 244 (5th Cir. 1978), rev'd, 466 U.S. 55 (1980). Cf. *Hendrix v. Joseph*, 559 F.2d 1265, 1269 (5th Cir. 1977); *McGill v. Gadsden County Comm'n*, 535 F.2d 277, 280-281 (5th Cir. 1976) (plaintiff did not show that state policy was tenuous or discriminatory). Compare *Moore v. Leflore County Bd. of Election Comm'rs*, 502 F.2d 621, 624-625 (5th Cir. 1974) (in reviewing the remedy imposed by the district court, "[e]qualization of land area and road mileage is extremely important here").

courts from considering the legitimacy and weight of the State's interest in such rules, focusing instead solely on their dilutive effect. What is more, focusing exclusively on the dilutive effects of a state electoral practice while not giving any weight to the State's interests could well lead to requiring proportional representation, which the Act expressly states is not required. Congress hardly intended that the operation of Section 2 would result in an outcome that its text expressly disavows.

At the same time, we do not mean to suggest that proof of a strong state interest automatically trumps proof of racial vote dilution. Section 2 is a broadly based prohibition on electoral practices that, intentionally or not, deny minority voters equal access to the electoral process. As a footnote in the Senate Report explains, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors [derived from *Zimmer v. McKeithen*, *supra*] that the challenged practice denies minorities fair access to the process." Senate Report 29 n.117. See *Bolden v. City of Mobile*, 571 F.2d 238, 244 (5th Cir. 1978) ("[c]ity-wide representation is a legitimate interest, and at-large districting is ordinarily an acceptable means of preserving that interest [but] the district court was warranted in finding that the city's interests in its at-large plan did not outweigh the strong showings by the appellees under the other *Zimmer* criteria"), *rev'd*, 446 U.S. 55 (1980).

The often dilutive effect of at-large elections on minority voting strength was of considerable importance to Congress in 1982. Congress knew that many localities had enacted at-large systems for legitimate governmental reasons, and no one disputed that there was legitimate governmental support for at-large elections. "The reason usually given in support of at-large elections for municipal offices is that at-large representatives will be free from possible ward parochialism and will keep the in-

terests of the entire city in mind as they discharge their duties." *Wallace v. House*, 515 F.2d 619, 633 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1976). See also *McMillan v. Escambia County*, 638 F.2d 1239, 1244 (5th Cir. 1981) (describing "good government" basis for at-large elections). Congress explicitly relied on a list of 23 lower court decisions that applied dilution principles. Senate Report 32. In several of those cases, where defendants had alleged race-neutral grounds for at-large elections, the courts held that the elections were unlawfully dilutive and required the adoption of a single-member districting system for future elections to ensure that the State's electoral methods did not dilute minority voting.¹³

Analysis should also be informed, however, by the fact that the role of judges differs from those of legislative and executive officials. In balancing the strength of race-neutral state policies against evidence of vote dilution under the "totality of circumstances," it is obviously pertinent to consider the nature of the office at issue. The most obvious difference is that while legislators, and, perhaps, to a lesser extent, executive officials are expected to advance and protect the interests of their constituents, and are elected to do just that, judges are expected to be fair and impartial. Thus, "responsiveness" to minority voters is not a relevant concern in evaluating judicial elections.

The important state interest in ensuring a fair and impartial judiciary must also be carefully considered in evaluating a State's decision to elect judges at-large. The State may believe that judges should be discouraged from thinking of themselves as representing only a por-

¹³ *Zimmer v. McKeithen*, 485 F.2d at 1307; *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975). See also *Wallace v. House*, 515 F.2d at 632-633; *Bolden v. City of Mobile*, 571 F.2d at 244.

tion of a particular jurisdiction.¹⁴ In addition, a State may determine that small electoral districts must be avoided in order to prevent a relatively discrete segment of the jurisdiction from controlling the election of trial judges. A State may determine that fairness, impartiality, and public confidence are significantly aided where all the people who may generally appear before a particular judge have a voice in the election of that judge.¹⁵ Finally, to the extent that there are legitimate and strong state interests in the at-large election of trial or appellate judges, that is powerful evidence that minority electoral failure is not the product of a "built-in bias" against minorities but stems, instead, from other, neutral factors. *Whitcomb v. Chavis*, 403 U.S. at 153. Considering the State's interests—which may be different in both nature and magnitude for the at-large election of judges than for the at-large election of legislators—is therefore consistent with the principle in the case law and legislative history that "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality' and on a 'functional' view of the political process." *Thornburg v. Gingles*, 478 U.S. at 45 (quoting Senate Report 30 & n.120). See *White v. Regester*, 412 U.S. at 766-767; *Whitcomb v. Chavis*, 403 U.S. at 149-155.

Section 2 is broad in its reach, but there is no reason to believe that, in passing the amendment in 1982, Con-

¹⁴ Of course, where the plaintiff can prove that the adoption or maintenance of an at-large system, whenever it occurred, was motivated by racial discrimination, the State's interests are not entitled to deference.

¹⁵ A State may conclude that its court of last resort is the authoritative source of state law, including the state constitution, and that all of the people in the State should have a vote for each member of the court entrusted with that responsibility. Once a State, as here, decides to elect judges from areas smaller than the entire State, closer scrutiny is appropriate, as the State has already determined to make the judge accountable to only part of the State's electorate.

gress sought to alter the fundamental nature of judicial offices established by the State or require a method of election that irreconcilably conflicts with those offices. After all, Section 2 is addressed to voting practices, not to the definition of state offices. Thus, if Texas consistently elects trial or appellate judges at-large in order to ensure the appearance of fairness and impartiality in the judicial process, its interest may not be just "strong" but "compelling." Such an interest should be considered along with other factors in the totality of circumstances.

2. The district court did not consider whether the State has a strong, nondiscriminatory policy supporting the use of at-large judicial elections

Judge Higginbotham concluded that Texas has tied together a district court's electoral and jurisdictional base as a means of protecting each judge's independence without compromising the fact and appearance of impartiality. The independent decisionmaking authority of each trial judge is "a structure we must accept," Pet. App. 104a, Judge Higginbotham concluded, and a federal court cannot create or direct the State to create single-member districts for judicial elections because doing so would interfere with the State's achievement of those critical governmental interests. *Id.* at 108a-112a. We believe that Judge Higginbotham's conclusions are at least premature, as the facts necessary to a proper assessment of the way in which Texas uses at-large elections to advance governmental interests, and the strength of those interests, have been neither fully developed nor analyzed. It is not clear that Texas has met the standard in this case of demonstrating that at-large elections of trial judges serve a strong state policy. Nor has the state policy been weighed against the evidence of vote dilution in this case. The case therefore should be remanded so the district court can carry out the appropriate analysis.

a. *A representative yet impartial judiciary.* The State's principal justification for holding at-large judicial

elections is that using subdistricts could lead to the fact and perception of judicial bias and undue influence by special interest groups. This rationale has been used to defend at-large elections for legislative and executive offices, see *City of Mobile v. Bolden*, 446 U.S. at 70 n.15 (plurality opinion); *Zimmer v. McKeithen*, 485 F.2d at 1301; cf. *The Federalist* No. 10, at 82-84 (J. Madison) (C. Rossiter ed. 1961),¹⁶ but assumes heightened importance in judicial elections, for all the reasons the judiciary is different from the other branches. Several witnesses testified that at-large election of judges was necessary for this reason,¹⁷ and this factor may be one of the "totality of circumstances" showing that minority electoral failure cannot be attributed to a state system that improperly dilutes minority votes.

¹⁶ See also *Dallas County v. Reese*, 421 U.S. 477, 479-480 (1975); *Chapman v. Meier*, 420 U.S. 1, 20 n.14 (1975); *Dusch v. Davis*, 387 U.S. 112 (1967); *Fortson v. Dorsey*, 379 U.S. at 438 (all concluding that multimember districts can be justified on the ground that an officeholder represents the entire geographic region, not simply one district).

¹⁷ For example, District Judge Mark Davidson testified that holding elections for judges from districts that are smaller than the existing county-wide districts would mean that "the political pressures, at least on judges from Harris County, would increase substantially," 3 Tr. 264, and "forum shopping * * * would increase dramatically," as parties sought to "find an attorney * * * with some political pressure, for example, over the Judge of the Court whose case you fell in," 3 Tr. 265. Professor Anthony Champagne opposed creating subdistricts because "[t]heoretically the larger the population you serve the more insulated a Judge would be from special interest group pressure." 4 Tr. 146. District Judge Carolyn Wright expressed the same opinion. 4 Tr. 191. District Judge Harold Entz testified that using smaller electoral districts could give rise to a public perception that some judges would be elected, and some litigants would be successful, simply because of their race. 4 Tr. 82, 88-90. He also expressed concern that smaller judicial districts could help enable large-scale drug traffickers to influence the outcome of elections. 4 Tr. 83-84.

There is, however, evidence tending to disprove the claim that at-large county-wide elections are essential to ensure a representative and impartial bench. The Texas Constitution does not require county-wide election of the district judges; it permits the voters to select them from sub-county districts. Tex. Const. Art. 5, § 7a(i). Justices-of-the-peace are elected from precincts smaller than a county, and some election districts of a similar size could be created here.¹⁸ There also was testimony that justices-of-the-peace, who are elected from such precincts, had no difficulties with bias or allegations of bias. 4 Tr. 90. Electoral districts that are smaller than a county can still be quite large. Harris County, for example, has a population of nearly 2.5 million and 59 district judges. Even were Harris County to be divided into 59 subdistricts (a remedy that we do not contend is required), each district would contain approximately 41,000 people.¹⁹ Moreover, were a remedy necessary, the use of several multimember districts in large counties might be far preferable to the use of single-member districts. Finally, the potential for the fact or appearance of bias is present whenever judges are elected, while the interest in making judges accountable to minority voters can perhaps be served only by eliminating an at-large system.

¹⁸ County population ranges from 82,000 (Midland County) to 2.4 million (Harris County). Under the Texas Constitution, counties with a population of 30,000 have 4-8 justices-of-the-peace subdistricts, while counties with a population of 18,000 can have 2-5 such precincts. Tex. Const. Art. 5, § 18(a).

¹⁹ Dallas County, with a population of 1.5 million people, has 37 judges. Were it divided into 37 subdistricts, each one would contain about 42,000 people. There are currently judges elected county-wide from counties with populations of similar size. By our count, 114 of Texas's 362 district courts are elected from areas of less than 100,000 people, and 61 of those are elected from areas of 50,000 or less. (County populations were determined by reference to United States Department of Commerce, 1980 Census of Population—Texas (1982).)

b. *Electoral accountability.* A related justification for holding countywide at-large elections is that it helps to ensure that judges are accountable to the persons over whom they exercise jurisdiction.²⁰ That rationale is a legitimate one, but its force is weakened by the fact that Texas law does not treat all judges alike.²¹ Justices-of-the-peace, which are trial courts below the level of district courts, are elected from sub-county precincts even though these officers exercise jurisdiction over an entire county.²² District courts also can exercise jurisdiction over cases arising beyond the county boundaries since the parties can agree to permit a court to adjudicate a case that does not arise within the county. Page 3 & note 3, *supra*. Furthermore, district court judges often hear cases in other counties to help manage the docket, 5 Tr. 120, and the residents of a county in which a district judge temporarily sits have no recourse against him at the polls. This disuniformity may signify that the accountability rationale is less weighty in practice than might otherwise be the case.

c. *Specialized courts.* District Judge Davidson testified that applying the results test of Section 2 could disrupt

²⁰ For instance, Texas Supreme Court Chief Justice Thomas Phillips, testifying for the State, said that at-large elections assured that judges "ought to be accountable to those people who can be haled into their Court," 5 Tr. 120, and trial judges therefore ought to be elected from the same area over which the court has jurisdiction.

²¹ Witnesses also testified that votes for judges were cast based on factors such as party affiliation, name recognition, or other considerations unrelated to judicial performance. 3 Tr. 270; 4 Tr. 120; 5 Tr. 129. Although that fact would tend to undercut the State's asserted interest in accountability, because the same criticism can be lodged against any electoral scheme, it is not clear that this criticism has any weight here.

²² Justices-of-the-peace can try cases that arise in other precincts. *Bradley v. Swearingen*, 525 S.W.2d 280, 282 (Tex. Civ. App. 1975). See also *Zulauf v. State*, 591 S.W.2d 869, 872 & n.5 (Tex. Crim. App. 1979).

the use of specialized courts. Because the counties that use specialized courts generally have many of each type of court, pages 4-5 note 5, *supra*, the State could retain the use of specialty courts in large counties and still remedy dilution, were any such remedy necessary, by, for example, dividing the specialty courts among districts and having each district elect each type of judge.

d. *Administrative benefits.* Several witnesses testified that county-wide elections have administrative advantages that would be lost if smaller electoral districts were used, such as county-wide records retention, random assignment of cases to judges within the county (which aids docket control), and county-wide jury selection. 3 Tr. 257, 264; 4 Tr. 257, 261. Such benefits may well be valuable, but by themselves are insufficient to justify a racially dilutive electoral process. See *Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1211 (5th Cir. 1989).

e. *Other aspects of at-large judicial elections.* It may be possible to modify other aspects of the electoral apparatus in a fashion that ameliorates the dilutive effect of an at-large system. For instance, judges are elected in head-to-head contests. That factor, which the legislative history of Section 2 identified as a common method of diluting minority voting strength, Senate Report 29, could be modified without also eliminating at-large elections.

In sum, the careful assessment of the strength of the State's interests in the present method of election has not been properly performed, nor have those interests been balanced against the showing of vote dilution. The case should be remanded for that purpose.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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APPENDIX

STATUTE INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in section 1973b (f) (2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

MAR 4 1991

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,
v. *Petitioners,*

CHARLES ROEMER, *et al.*,
Respondents.

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
v. *Petitioners,*

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

(Caption Continued on Inside Cover)

On Writs of Certiorari to the United States
Court of Appeals for the Fifth Circuit

**BRIEF FOR THE LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW, THE AMERICAN CIVIL
LIBERTIES UNION, THE MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND, THE AMERICAN
JEWISH CONGRESS, AND THE AMERICAN JEWISH
COMMITTEE AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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March 4, 1991

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-757

RONALD CHISOM, *et al.*,
v. *Petitioners,*

CHARLES ROEMER, *et al.*,
Respondents.

No. 90-1032

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v. *Petitioner,*

CHARLES ROEMER, *et al.*,
Respondents.

No. 90-813

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
v. *Petitioners,*

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

No. 90-974

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IN SUPPORT OF PETITIONERS**

INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens is an important part of the Committee's work, and the Committee has represented minority citizens in challenges to discriminatory judicial elections in Mississippi, Louisiana and Florida under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. In the Louisiana case, the trial court found liability under Section 2 following a full trial on the merits (*Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988)), but was required to vacate the finding because of the Fifth Circuit's holding in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc).

The American Civil Liberties Union is a nationwide membership organization with over 250,000 members. It has a longstanding concern with promoting equality of the franchise. Since 1965, it has maintained a Southern Regional Office which represents minority voters in a number of voting rights cases, including the Voting Rights Act challenge to discriminatory judicial elections in Georgia.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure,

through litigation and education, the constitutional and civil rights of Hispanics living in the United States. MALDEF and its attorneys have engaged in substantial litigation to protect the right of Hispanics to an undiluted vote as guaranteed by the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act.

The American Jewish Congress is a not-for-profit organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of Americans. The Congress believes that in a democracy, these rights depend upon free and fair access to the ballot and the political process. In accordance with that belief, the Congress has long advocated, both in legislatures and courts, vigorous protection of the right to vote.

The American Jewish Committee ("AJC") is a national organization founded in 1906 for the purpose of protecting the civil and religious rights of Jewish Americans. It has always been the conviction of the AJC that the security and the constitutional rights of Jewish Americans can best be protected by helping to preserve those of all Americans, irrespective of race, religion, sex or national origin.

Each of the *amici* participated in the legislative process culminating in the enactment of amended Section 2 in 1982. *Amici* are, therefore, particularly competent to offer views regarding the principles and history associated with the legislation. In addressing the major points that refute the lower court's restrictive construction of Section 2, *amici* have paid special attention to arguments and information not included, or not developed as fully, in the parties' briefs.

SUMMARY OF ARGUMENT

1. Contrary to the holding of the United States Court of Appeals for the Fifth Circuit, Congress did not intend to exclude discriminatory elections for state judges from the coverage of Section 2 at the same time it amended the statute in 1982 to eliminate the requirement of proving discriminatory intent.

A. An examination of the language and structure of Section 2 demonstrates that it covers all elections. Section 2(a) uses the terms "vote" and "voting" to describe Section 2's scope, and those terms are defined in Section 14 (c) (1) of the Act, 42 U.S.C. § 1973l(c) (1), to include "any primary, special, or general election . . . with respect to candidates for public or party office." By contrast, Section 2(b) does not serve the function of describing the scope of elections covered, but instead sets forth how "a violation of Section 2(a) is to be established." Thus, there is no warrant for concluding that the word "representatives," which appears only at the end of a conjunctive clause in one sentence of Section 2(b), is a definitional term intended to exclude an entire category of elections from the coverage of Section 2.

B. In addition, even if Section 2(b) could be read to define the scope of elections covered, the use of the word "representatives" does not indicate an intent to exclude elected judges, but instead refers to any elected official. The use of the word in political science literature and historical writing on the constitution and judicial selection, as well as its practical usage, demonstrate that it can readily be employed without excluding elected judges.

C. The purpose of the 1982 amendment was to expand the statute's coverage by eliminating any requirement of proving discriminatory intent. It is inconceivable that Congress, at the same time, would have removed from Section 2 an entire category of elections without any mention of the exclusion in the extensive debates, congres-

sional hearings, and committee reports that accompanied the legislation. Furthermore, testimony at the congressional hearings concerning the 1982 amendments to the Act described pre-1982 vote dilution litigation involving elected judges, discussed discriminatory practices in judicial elections, and mentioned the aspirations of minorities for greater representation on the elected state bench. This contradicts the contention that Congress, without any indication in the legislative history, excluded discriminatory elections for judges from the scope of Section 2.

2. Judge Higginbotham, along with three other judges, concluded that Section 2 covers appellate judges but not trial judges. However, Congress never suggested any intent to limit Section 2 to such selective coverage, and the language, purpose, and legislative history refute Judge Higginbotham's concurrence. The view advanced by the concurrence is that the state interests behind maintaining electoral districts geographically coextensive with trial court jurisdiction are so strong that they automatically outweigh the goals of Section 2 and are therefore invulnerable to challenge under Section 2. That is nothing more than an attack on the potential remedy of subdistricting, by which judges are elected from subdistricts within a judicial district and hear cases from throughout the district. However, even if that analysis of subdistricting were correct, a state has other options to consider when adopting remedial plans—options that would protect any state interest in keeping electoral districts geographically coextensive with the trial judges' normal jurisdiction. The appropriateness of subdistricting as a remedy is not dispositive of the *general applicability* of Section 2 to trial judges. Moreover, there is no reason to believe that the state's interests would be undermined by subdistricting. In addition, the concurring opinion misconstrues the nature of the interests protected by Section 2, and places far too much weight on the "responsiveness" of elected judges to minority litigants if subdistricting were to occur.

3. Judge Clark, in a concurring opinion for himself, contended that Section 2 does not apply to any elections for trial or appellate judges where the judges' jurisdiction is geographically coextensive with their election district. There is no reason to believe Congress intended such an exception to Section 2. As with Judge Higginbotham's concurrence, Judge Clark's view is premised on what he perceives to be the fundamental state interest in retaining judicial election districts that are coextensive with the normal jurisdiction of the judges elected. That view erroneously assumes that subdistricting is the only remedy available for state to adopt, and misperceives both the state's interests and the interests Congress sought to protect with Section 2.

ARGUMENT

I. THE LANGUAGE, STRUCTURE, PURPOSE, AND LEGISLATIVE HISTORY OF SECTION 2 SHOW THAT CONGRESS INTENDED IT TO APPLY TO ALL ELECTIONS AND DID NOT INTEND TO EXCLUDE JUDICIAL ELECTIONS.

In 1982, Congress amended Section 2 to broaden its coverage by eliminating any requirement of proving discriminatory intent. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). The Fifth Circuit held that Congress, by using the word "representatives" in the text of Section 2, intended at the same time to exclude all elections for state court judges from Section 2's coverage, even though no such exclusion is mentioned anywhere in the numerous debates and hearings and the lengthy committee reports on the amendment. The Fifth Circuit's reliance on this one word runs afoul of this Court's frequent admonition that courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (internal quotations and citations omitted). As demonstrated below, the language and structure of Section 2, the purpose of

the 1982 amendment, and the legislative history all refute the Fifth Circuit's interpretation.

A. The Language and Structure of Section 2 Compel the Conclusion That All Elections, Including Judicial Elections, Are Covered.

The language and structure of the Act establish that Section 2 is not selective with respect to the offices covered, but is instead all-inclusive of every type of election and elected office.¹ Section 2 itself contains *no* office-by-office list of the specific elective positions that are covered. Instead, Congress established the scope of Section 2 by employing in Section 2(a) two terms—"vote" and "voting"—that are specifically defined in Section 14(c)(1) of the Act to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, . . . casting a ballot and having such ballot counted properly with respect to candidates for public or party office." 42 U.S.C. Section 1973l(c)(1). These broad definitions clearly encompass elections for judges.

Section 2(a), then, establishes the all-inclusive scope of the elections covered by using these two statutorily defined terms and providing:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.

In contrast, Section 2(b), in which the word "representatives" appears, does not serve the function of defining the scope of the offices covered by Section 2. In-

¹ This Court has stated that the starting point of statutory interpretation is the language of the statute itself. *See Demarest v. Manspeaker*, 111 S. Ct. 599, 602 (1991).

stead, Section 2(b) defines the *manner* in which a violation of subsection (a) is established. Section 2(b) begins by stating “[a] *violation of subsection (a) of this section is established if* [the specified showing is made].” (Emphasis added). The remainder of Section 2(b) sets forth the substantive showing that must be made, and contains a proviso dealing with the significance of the extent to which members of the protected class have been elected to office.

There is no such thing, therefore, as an elective office “covered” in Section 2(a) that is not also “covered” by Section 2(b), since Section 2(a) specifically states that it is to be applied “as provided in subsection (b) of this section,” while Section 2(b) specifically provides that it sets forth *how* “a violation of Section 2(a) is established.” Given this statutory structure and language, there is no support for the conjecture that an entire category of elections covered by Section 2(a) could suddenly turn up missing in Section 2(b).²

Indeed, most of the language of Section 2(b) echoes the same broad phrasing found in Section 2(a). The first sentence of Section 2(b) refers broadly to “the political processes leading to nomination or election in the State or political subdivision”—phrasing which by its terms incorporates all electoral processes without exception. That sentence continues by referring to the opportunity enjoyed by members of the protected class “to participate in the political process”—again, no exclusion of or reference to any particular category of elections—“and to elect

² Under the Fifth Circuit’s analysis, judicial elections are covered by Section 2 as long as *intentional* discrimination is proven, while challenges to all other categories of elections are not governed by any intent requirement. 914 F.2d at 625 n.6. It is impossible to find this distinction anywhere in the statutory language. In *Burlington Northern R. Co. v. Okla. Tax Commission*, 481 U.S. 454, 463-64 (1987), this Court unanimously reversed a Court of Appeals holding that would have read into a statute an intent requirement for some types of actions covered by the statute but not for others.

representatives of their choice.” The phrase as a whole (“to participate in the political process and to elect representatives of their choice”) clearly focuses on the actions and opportunities of the protected class and not on the specific categories of offices subject to the Act. It would be a strange method of drafting that would set about to exclude a category of elections from the statutory coverage by placing the all-important definitional term only at the end of a conjunctive clause in a long sentence that otherwise broadly defines the substantive standards in question.³ A straightforward and natural reading of the statutory language requires the conclusion that Congress did not intend the word “representatives” to exclude judicial elections from Section 2’s coverage.

B. The Word “Representative” in Section 2(b) Refers to All Elected Officials and Does Not Exclude Judges.

There is a much simpler explanation for Congress’ use of the word “representatives” than that employed by the Fifth Circuit majority. The portion of subsection (b) in which the word appears was taken from *White v. Regester*, 412 U.S. 755 (1973), which refers to minority groups whose members have less opportunity than others “to participate in the political process and to elect legislators of their choice.” *Id.* at 766. Congress substituted the word “representatives” for “legislators.” As the Sixth Circuit said in *Mallory v. Eyrich*, 839 F.2d 275 (1988), “[i]t seems evident that Congress was seeking a broader word to make it clear that subsection (b) is not

³ The parallel language defining the scope of Section 2 and Section 5 of the Act—the latter of which has been interpreted by this Court to encompass elections of state court judges, *Georgia Board of Elections v. Brooks*, 111 S. Ct. 288 (1990), summarily aff’g *Brooks v. State Board of Elections*, No. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court)—further establishes that Section 2 applies to judicial elections. This point is developed in the briefs of the petitioners and will not be discussed further here.

limited to legislative races.” *Id.* at 279. Without pausing to list all of the covered offices by title—an unnecessary exercise since the scope of the Act is defined elsewhere—the drafters of Section 2 substituted a more generic term in place of the word “legislators.”

The Fifth Circuit’s holding hinges on its belief that the word “representatives” can have only one meaning, and that meaning necessarily excludes judges. 914 F.2d at 625-27. Political science literature refutes such a narrow and singular understanding of the concept of “representation.” For instance, Professor Hannah Pitkin’s highly-regarded work, *The Concept of Representation* (1967), notes that “[c]ourts, judges and juries have been discussed as representative organs of the state.” *Id.* at 227. Pitkin offers several examples of how judges can be considered “representatives”:

From a formalistic standpoint, a judge is an agent of the state like all government officials. His pronouncements are not private expressions of opinion, but official utterances of the state. Hence he represents the state. In a democracy where all agencies of the government are servants of the sovereign people, the judge might be said to represent the people. From the “standing for” interpretation, he may represent by embodying the values of a society. From the doctrine that anyone whose commands are obeyed and whose leadership is accepted is a representative, a judge certainly represents. . . .

Id. at 116-117.

Use of the words “representatives” and “represent” with respect to judges are features of the historical writing on the Federalist and Jacksonian eras, the seminal moments in the establishment, respectively, of the federal and the elective state judiciaries. James Wilson, distinguished jurist and delegate to the Constitutional Convention, wrote of “[t]he extension of the theory and practice of representation through *all* the different de-

partments of the state" in America. 1 *The Works of James Wilson* 311 (R. McCloskey, ed. 1967) (emphasis added). Professor Edmund S. Morgan, writing about the development of state constitutions and the federal constitution in the United States, said this:

A constitution superior to ordinary legislation could insure a strong position in government to the executive and the judiciary as well as the legislature, by making them all representatives of popular sovereignty and guaranteeing to them all a share in the power that supposedly emanated from the people.

E. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 260-61 (1968) (emphasis added). See also, G. Wood, *The Creation of the American Republic, 1776-1787* 456, 460, 596-99 (1969) (noting that American political thought of the late 1780s viewed all three branches of government as representatives of the people).

Many reformers of the Jacksonian era who favored the election of judges certainly considered judges chosen by the people to be representatives in some sense. Writing of that time, Charles M. Cook noted the belief of reformers that, through election, judges "would be made representative to the people and sensitive to their needs." C. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 161 (1981).⁴

The Fifth Circuit's opinion suggested that judges can never be considered "representatives" because they occasionally must make decisions contrary to public will

⁴ See also, F. Green, *Constitutional Development in the South Atlantic States, 1776-1860: A Study in the Evolution of Democracy* 279 (1930); K. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System* 103 (1979); Hall, "The 'Route to Hell' Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832-1920," in *Ambivalent Legacy: A Legal History of the South* 229, 237-38 (D. Bodenhamer & J. Ely eds. 1984).

and may not favor any particular constituency in discharging their duties. 914 F.2d at 626. Of course, the same is true of any number of elected executive or qualitative legislative officials whom the Fifth Circuit would consider to be "representatives," such as prosecutors, constables, civil service boards, tax assessors, recorders of deeds, and prothonotaries. Indeed, legislators take an oath to uphold the Constitution, and occasionally act against the public will in fulfilling that oath.

Moreover, judges sometimes do consider and translate the popular will into judicial decisions, for instance in the development of the common law or the determination of what constitutes cruel and unusual punishment. Thus, judges are "representatives" or agents of the public in the ongoing evolution of legal doctrine.⁵ Elected judges can also be said to "represent" the choice of the voters as to who will best serve the public good in discharging the duties of the judiciary.

Thus, the use of the word "representatives" does not evidence an intent to exclude elected judges.

C. The Purpose of the 1982 Amendment Was to Broaden Section 2's Coverage, and the Legislative History Belies Any Intent to Exclude Judicial Elections.

Congress' purpose in amending Section 2 was to broaden the Act's coverage by eliminating any requirement of proving intentional discrimination. *Thornburg v. Gingles*, 478 U.S. at 35. The Fifth Circuit's holding that Congress, at the same time, narrowed the coverage of Section 2 to exclude an entire category of elections

⁵ Indeed, in a recent letter to the federal district judge in *Clark v. Roemer*, No. 90-952, the case involving Louisiana trial and appellate judges, the attorney for the State defendants in both *Clark* and in *Chisom v. Roemer*, No. 90-757, Robert Pugh, wrote of one elected Louisiana judge who had retired and who "is no longer representing his former district" (emphasis added) (December 28, 1990 letter from Robert Pugh to Hon. John V. Parker, reproduced in the attached appendix).

simply cannot be squared with the well-documented congressional intent, and is unsupported by even a sliver of evidence in the legislative history.⁶

⁶ The Fifth Circuit incorrectly relied upon an alleged "presumption" that Congress intended to incorporate the phraseology of cases holding the one-person, one-vote principle inapplicable to judicial elections. 914 F.2d at 628. None of those cases are cited in the legislative history of the 1982 amendment. See *Demarest v. Manspeaker*, 111 S. Ct. at 603-04 (declining to apply a presumption that Congress incorporated prior administrative and judicial decisions in a statute where there was no evidence Congress was aware of the prior interpretations and where the statutory language did not support the interpretation at issue). Moreover, the presumption, if applicable, supports plaintiffs, because it imputes to Congress knowledge only of "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Much more pertinent to the 1982 Section 2 amendment than the one-person, one-vote cases is the 1980 holding of the Fifth Circuit in *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980). There, the Fifth Circuit held that a racial vote dilution challenge could be maintained against at-large judicial elections under the Fourteenth and Fifteenth Amendments irrespective of the inapplicability of the one-person, one-vote rule. Congress' presumed awareness of *Voter Information Project* would indicate that discriminatory judicial elections are not excluded from the coverage of amended Section 2, especially given that Congress broadened the statute in 1982 so that a showing of intent as required in litigation under the Fourteenth and Fifteenth Amendments would not be necessary.

Moreover, the Senate Report cites a 1977 en banc decision of the Fifth Circuit in a successful vote dilution challenge to districts used to elect county boards of supervisors and justices of the peace (who are trial judges in Mississippi). See S. Rep. at p. 29 n.114, 31 n.121, citing *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977) (see 554 F.2d at 140 n.1 for description of offices at issue in *Kirksey*). See also, e.g., *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 956 n.9 (5th Cir. 1978) (noting that districts at issue in vote dilution challenge were used to elect justices of the peace, among other officials). These and other vote dilution suits dealing with county boards of supervisors and justices of the peace in Mississippi were also specifically discussed in the testimony of several witnesses at the House and Senate hearings. See Part I.C, *infra*, for a discussion of this testimony.

To the contrary, the available legislative history supports the proposition that all elections, including judicial elections, remain within the coverage of amended Section 2. As stated in the Senate Judiciary Committee report accompanying the 1982 amendment, Congress amended Section 2 in order "to prohibit *any* voting practice, or procedure [that] results in discrimination" without regard to whether there is proof of discriminatory intent. S. Rep. 97-417, 97th Cong. 2d Sess. 2 (1982), reprinted in 1982 U.S. Code Cong. & Adm. News 177, 179 (emphasis added). See *Thornburg v. Gingles*, 478 U.S. at 43. While various lower court opinions⁷ and the briefs of some of the parties in this Court discuss other aspects of the legislative history, *amici* focus here particularly on the congressional hearings held on the 1982 extension and amendment of the Voting Rights Act.⁸

In interpreting the Voting Rights Act, this Court has looked to the purposes of the Act and the forms of discrimination it was designed to remedy, including those described in the testimony of witnesses during the congressional hearings. See, e.g., *Perkins v. Matthews*, 400 U.S. 379, 387-389 (1971); *Allen v. State Board of Elections*, 393 U.S. 544, 563-569 (1969). At the 1981 and 1982 congressional hearings in both the House and the Senate, numerous minority witnesses and representatives of civil rights organizations testified about discrimination in judicial elections, presented examples of how vote dilution hampered the election of minority

⁷ See, e.g., *Mallory v. Eyrich*, 839 F.2d at 278-80.

⁸ *Extension of the Voting Rights Act: Hearings on H.R. 1407, H.R. 1731, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981)* ("House hearings"); *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong. 2d Sess. (1982)* ("Senate hearings").

judges, and articulated the need for better minority representation on the bench.

Several of the witnesses gave testimony and statements concerning extensive pre-*Bolden* litigation over dilution of black voting strength in the drawing of districts used to elect Mississippi county supervisors, justice court judges (justices of the peace), constables, county school board members, and county election commissioners.⁹ Mississippi State Senator Henry J. Kirksey described the outcome of one such lawsuit in 41-percent black Warren County, Mississippi, to respond to Senator Metzenbaum's questions concerning whether the use of the "results" test prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), had resulted in "proportional representation":

In 1979, the Federal district court ordered into effect a plan which resulted in the election of one black county supervisor, one black justice of the peace, and two black constables—the first black elected officials in Warren County since reconstruction. Since there are five supervisors, justices of the peace, and constables from each district, we clearly did not obtain proportional representation.

Senate hearings at 669. Referring to this same litigation, a statement submitted by Robert M. Walker, Field Director of the Mississippi NAACP, noted that as a result of the litigation "a Black supervisor, a Justice Court judge and two constables were elected, giving Black Warren countians representation for the first time since the 19th century." House hearings at 2648.¹⁰

⁹ In Mississippi, justice court judges, formerly known as justices of the peace, are judicial officers at the trial court level.

¹⁰ See also House hearings at 1745 (testimony of Senator Kirksey in response to questioning by Representative Don Edwards, House Subcommittee Chairman, explaining that "we are able to elect two county supervisors, two justices of the peace, and some other officers" as a result of voting rights litigation in Hinds County, Mississippi).

Amicus Lawyers' Committee for Civil Rights Under Law submitted a report to both the House and Senate subcommittees which included a detailed description of the Mississippi lawsuits over county districting and made numerous specific references to the impact of the lawsuits on county justice of the peace elections.¹¹ The Senate Judiciary Committee Report cites one of these lawsuits in which the Fifth Circuit held that discriminatory lines used to elect county boards of supervisors, justices of the peace and other county officials were unlawfully dilutive of black voting strength.¹²

The hearings included examples of the difficulties faced in electing minorities to judicial office. A witness representing *amicus* MALDEF helped document the continuing impact of race in electoral politics by describing in detail how the local Democratic committee in Aransas County, Texas, engineered the election of a deceased person as justice of the peace in order to prevent the election of the first Mexican-American to that office.¹³ Full-page newspaper advertisements, reprinted in the House hearings transcript, advised voters:

THE NAME OF LAWRENCE MILLER, Candidate for Justice of the Peace, Precinct 1, will be on the Democratic Ballot on May 6th. You are entitled to

¹¹ Report of the Lawyers' Committee for Civil Rights Under Law, *Voting in Mississippi: A Right Still Denied*, reprinted in House hearings at 499, 516-28. See also Senate hearings at 673 (prepared statement of Sen. Kirksey, noting submission of report to Senate subcommittee), 1228 (prepared statement of Frank R. Parker, Esq., summarizing report). The report is cited at several points in the Senate Report accompanying amended Section 2. See S. Rep. at 10 n.21; 10 n.22; 13 n.35; 51 n.177.

¹² *Kirksey v. Board of Supervisors of Hinds County* (cited in S. Rep. at 29 n.114, 31 n.121).

¹³ House hearings at 930 (testimony of Joaquin Avila, Esq., of *amicus* MALDEF). See also *id.* at 940-42 (prepared statement of Avila); 1253 (testimony of Ruben Bonilla, president of petitioner LULAC, describing same election).

vote for him even though he is now deceased. If Judge Miller receives a majority of the votes cast, the Aransas County Democratic Committee will convene and select a nominee whose name will be certified to be placed on the General Ballot for November.

House hearings at 1010. Moreover, witnesses specifically noted the adverse effect of at-large judicial elections on the potential for minority electoral success. Mississippi NAACP Field Director Robert Walker described an attempt by the Mississippi legislature to change from district-based to at-large justice court elections, and stated "[i]f accepted, this obvious attempt to dilute the Black vote would set this State back 100 years." House hearings at 2647. Mississippi State Representative Fred Banks decried this same effort to establish "an at-large system for the election of justices who are now elected by district in the counties." House hearings at 550. The record also contains references to the role played by polarized voting in judicial elections.¹⁴

Witnesses also testified about minority aspirations to judicial office in the context of the Voting Rights Act. From the first black elected state judge in majority-black Sumter County, Alabama, Honorable Eddie Hardaway, Jr., Congress heard about the importance of the Act in terms of the racial integration of the bench:

¹⁴ *E.g.*, House hearings at 949 (prepared testimony of Avila, describing how a minority candidate for a Texas Court of Appeals judgeship was defeated by racially polarized voting in a 1980 election); Senate hearings at 306 n.33 (prepared statement of Vilma Martinez, President and General Counsel of MALDEF, noting that evidence of polarized voting in justice of the peace elections was submitted to the court in *Seamon v. Upton*, E.D. Tex. No. P-81-49-CA, the Texas congressional reapportionment challenge); House hearings at 260 (prepared statement of Dr. James W. Loewen, Associate Professor of Sociology, University of Vermont, referring to racial polarization in an Alabama judicial race).

I sit here today, as living proof that a poor, rural black country boy in Alabama can, as a result of the Voting Rights Act, be elected to public office. Without a Voting Rights Act, there is no doubt in my mind that I would not be the district judge of Sumter County.

House hearings at 825.¹⁵ See also House hearings at 571 (testimony of Bennie Thompson, contrasting fairness in the administration of justice before and after his election as mayor and judge of Bolton, Mississippi, in response to questioning by Rep. Edwards).¹⁶

Witnesses made it clear that judicial elections were considered an important target for efforts to increase minority representation in elected office. Describing offices being targeted by black candidates in Sumter County, Alabama, Judge Hardaway stated:

In 1982, most major offices in county government will be up for grabs. That is, the probate judge, tax assessor, tax collector, circuit clerk, sheriff, and three county commission[ers] will be up for re-election. As it now stands, there is a strong possibility that blacks may be elected to some of these positions.

House hearings at 825. Adolfo Alvarez, a Frio County, Texas commissioner, told the House subcommittee that "[b]ecause of the existence of the Voting Rights Act and our work in the community, we now have two Mexican American county commissioners and three Mexican American justices of the peace out of four." *Id.* at 1188.

Additional witnesses pointed to the lack of minority representation on the bench as an evil that had per-

¹⁵ See also Senate hearings at 748 (testimony of Abigail Turner, Esq., referring to Judge Hardaway's election).

¹⁶ As Mr. Thompson explained, in towns under 10,000 in Mississippi at the time, the mayor also served as city judge. Under the Fifth Circuit's holding, elections would be covered by Section 2 only with respect to the mayor's office and not with respect to the judicial position.

sisted despite advances made under the Voting Rights Act to date. Georgia State Senator Julian Bond noted that "even though Blacks now represent over 26 percent of the Georgia population, they continue to be underrepresented in the halls of the General Assembly, the City Halls, the County courthouses, and the Judicial Chambers of our state." *Id.*, p. 234 (prepared statement). Professor Brian Sherman, in discussing evidence of "low or no [black] representation in county government" in Georgia, pointed out that "[o]f the 47 counties for which we have information, only 1 reports the election of a black judge to superior court since the passage of the Voting Rights Act." House hearings, p. 574.¹⁷

These references in the hearings to judicial elections are consistent with the understanding that the Voting Rights Act and its provisions, including Section 2, covered all elections. No witness and no member of Congress at any time suggested that judicial elections should be excluded from Section 2's coverage. All of this belies the notion that Congress intended to narrow the Act to exclude judicial elections at the same time it was broadening the Act to better protect the victims of racial discrimination.

II. NOTHING INDICATES CONGRESS INTENDED SECTION 2 TO APPLY ONLY TO ELECTIONS FOR APPELLATE COURT JUDGES AND NOT TO ELECTIONS FOR TRIAL COURT JUDGES.

Part I of Judge Higginbotham's concurring opinion concluded that Congress intended to include judicial elections within the ambit of Section 2. In Part II, however,

¹⁷ See also *Voting in Mississippi: A Right Still Denied*, reprinted in House hearings, at 503 (listing numbers of blacks elected to Mississippi Supreme Court, county courts, and justice courts as of 1980). For additional references to judicial elections in the House and Senate hearings, see House hearings at 38, 193, 239, 280, 502, 763, 804, 806, 937, 1182, 1205, 1515, 1528, 1535, 1839; Senate hearings at 777, 788-89.

that opinion concluded that while elections for appellate court judges are covered, elections for trial judges are not. That portion of the opinion did not discuss the language of the statute or congressional intent, and is, at most, an explication of what its sponsors believe Congress *should have* intended with respect to Section 2 and trial judges. As to the real issue of what Congress *did* intend, there is absolutely no indication of a desire to include elections for appellate judges while exempting elections for trial judges from Section 2's coverage. As demonstrated in Part I of this brief, the language, purpose and legislative history establish that no elective office or category of elections is excluded from the scope of Section 2. Indeed, the fact that Section 5 covers elections for trial judges, *see Georgia Board of Elections v. Brooks*, also makes it highly unlikely Congress intended to exclude trial judges from the coverage of Section 2.

The concurrence concluded that the state interests behind retaining electoral districts geographically co-extensive with trial court jurisdiction are so compelling that they *always* outweigh the interests Congress sought to protect with Section 2, and are therefore immune from Section 2's ban on racial discrimination.

We are persuaded that, for purposes of the Voting Rights Act, because the fact and appearance of independence and judicial fairness are so central to the judicial task, a state may structure its judicial offices to assure their presence when the means chosen are undeniably directly tailored to the objective. The choice of means by Texas here—tying elective base and jurisdiction—defines the very manner by which Texas' judicial services are delivered at the trial court level Stated in traditional Fourteenth Amendment terms, there is compelling necessity sufficient to overcome the strict scrutiny of state acts impinging upon a fundamental interest.

914 F.2d at 646. This is a critique of the potential remedy of subdistricting, by which judges are elected

from subdistricts within a judicial district and hear cases from throughout the district. With subdistricts, there would be, in the words of the concurrence, no "tying [of] elective base and jurisdiction." Sections C and D of part II of Judge Higginbotham's opinion are largely a discussion of what he perceives to be the drawbacks of subdistricting. The concurrence cited the so-called "single-member office" exception articulated in *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), in support of the exclusion of trial judges from Section 2's coverage.

This section of the brief will first discuss how any state interests that purportedly underlie at-large trial judge elections can be accommodated within the context of Section 2 enforcement inasmuch as remedies other than subdistricting are available. Second, it will demonstrate that even if subdistricting were the only remedial option, the state's interests would not be threatened. Third, it will show the inapplicability of any "single-member office exception." Finally, it will discuss Judge Higginbotham's mistaken focus on responsiveness and his failure properly to consider the congressional purposes manifest in Section 2.

A. The Appropriateness of Subdistricting as a Remedy Is Irrelevant to the General Applicability of Section 2 Inasmuch as a State May Choose Remedies Other Than Subdistricting That Adequately Protect Any Interests It Has in At-Large Trial Court Elections.

Even if Judge Higginbotham's belief about the undesirability of subdistricting were correct, that has nothing to do with the *general applicability of Section 2* to elections for trial judge. Other remedies are available to the states that can protect any interests a state may have in retaining a congruence between electoral base and jurisdiction.

The matter of the appropriate remedy in a vote dilution case is first left to the responsible state officials.

White v. Weiser, 412 U.S. 783, 794-95 (1973). Those officials could choose from a number of options, any of which would hold out the promise of remedying racial discrimination yet retaining a coextensiveness between electoral base and jurisdiction. The options include "limited voting," which maintains at-large elections but alters other election features—the main alteration being a reduction in the number of votes available to each voter—to prevent white voters from sweeping all of the seats and to give minority voters an opportunity to elect candidates of choice to some of the judgeships. See *Dillard v. Town of Cuba*, 708 F. Supp. 1244 (M.D. Ala. 1988) (approving a consent decree adopting limited voting as a remedy in a Section 2 challenge to at-large elections); Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.C.L. 173, 223-31 (1989). They include "cumulative voting," which retains at-large elections and permits each voter to have as many votes as there are seats, but allows the voter to cast multiple votes for a single candidate. *Id.* at 231-36. They include the creation of smaller and racially fair judicial election districts within a pre-existing district, with cases arising from the new election districts assigned only to judges chosen from those election districts (with judges, of course, being able to help out with overloaded dockets of judges from other election districts just as visiting judges do now in Texas and most other states).¹⁸ The remedial options might include, in a given case, the realignment of counties among existing judicial districts to change the demographics of

¹⁸ The *LULAC* majority and concurring opinions assumed that all subdistricting systems, and all remedial election districts, would necessarily be "single-member." 914 F.2d at 623 (majority opinion); *id.* at 633 (Clark concurrence); *id.* at 649-51 (Higginbotham concurrence). That is not the case. Particularly in urban areas, it is frequently possible to draw majority black or Hispanic election districts that are multi-member and would elect several judges.

the districts, with judges hearing cases arising only from their realigned district. See *SCLC v. Siegelman*, 714 F. Supp. 511, 512 (M.D. Ala. 1989) (challenging the boundary lines between existing judicial districts).

Of course, the initial choice as to the best form of electing judges in the wake of a finding of a Section 2 violation belongs to the states themselves. In the weighing of the various state interests, some may choose subdistricting and some may choose other remedies. At the present time, the only issue before this Court is whether Section 2 is generally applicable. The appropriateness of subdistricting in light of any countervailing state interests is not an issue before this Court, and should be addressed only if and when it is.

B. Even If the Appropriateness of Subdistricting Were Somehow Relevant, the State Interests Identified by the Concurring Opinion Would Not Be Infringed by Subdistricting and Do Not Outweigh the Congressional Purpose of Eliminating Discrimination in Elections.

Even if the concurrence's view of the appropriateness of subdistricting were relevant, it is based upon asserted state interests that would not be infringed by subdistricting. Before discussing those, it is important to note that Congress, in amending Section 2, said the state's policy behind a particular electoral system is only one of many factors to be considered. S. Rep. at 29 and n. 117. The Senate Report—which this Court has said is the “authoritative source” for determining the congressional intent behind Section 2, *Thornburg v. Gingles*, 478 U.S. at 43, n.7—made it abundantly clear that the application of a state's policy in support of a given election system “would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.” S. Rep. at 29, n. 117. Certainly, if state policy cannot vitiate an otherwise successful Section 2 case, neither can it banish a whole category of elections

from the scope of Section 2 without some congressional indication that the category is excluded.

The state interest that Judge Higginbotham believed would be unalterably compromised by subdistricting is what he called "the fact and appearance of independence and fairness." 914 F.2d at 646.¹⁹ However, nothing suggests that judges elected from subdistricts would be less independent and fair than judges elected from the current system. It would be racially insulting for the State of Texas to believe that judges elected by minority voters will be less independent and fair than the current judges, almost all of whom are white and are elected by white voters with little say from minority citizens. Indeed, if there is any unfairness, it comes from the present system that robs minority voters of an equal vote, and perpetuates a nearly all-white judiciary in the midst of a multi-racial society.

Also, the state has no basis to contend that a judge elected from one subdistrict would be biased, or would appear biased, in a case involving a litigant from his or her subdistrict and a litigant from another. If Texas were concerned about that, it would not allow, for instance, a judge from Dallas to sit in a case in which

¹⁹ Judge Sam Johnson's dissent from the Fifth Circuit decision in *LULAC* demonstrates that Texas does not really believe its state interests are unalterably compromised by subdistricting. As Judge Johnson states, the Texas Constitution authorizes subdistricting for justices of the peace and subcounty districts for district courts. 914 F.2d at 669 (Johnson, J., dissenting). Moreover, it should be noted that the district court in *LULAC* found the state's asserted interests to be unpersuasive. That is a finding of fact subject to the clearly erroneous standard of Rule 52, F.R. Civ.P.; *Thornburg v. Gingles*, 478 U.S. at 77-79. The United States, as *amicus curiae* in the en banc Fifth Circuit, said "there is evidence in this record which undermines the notion that a remedy which would create subcounty districts would result in biased decisionmaking or even the appearance of biased decision-making." Supplemental Brief for the United States as *Amicus Curiae*, *LULAC v. Mattox*, No. 90-8014 (5th Cir.).

one litigant is from Dallas and the other from Houston. No such prohibition exists in state law.²⁰

What the state does know is that under a remedial plan minority voters would have a better opportunity to elect candidates of their choice to office, and that some of those candidates would most likely be minorities. But an objection to the application of Section 2 based on such considerations would be intolerable.

Judge Higginbotham also contended that the legitimacy of judicial decisions might come into question because a judge elected from a portion of the county would be making decisions "for the county as a whole." 914 F.2d at 650. This implies that no decision of a trial judge is legitimate unless it is made by a judge chosen by all of the voters. If that were the case, visiting judges would never be allowed to hold court in an area from which they were not elected. Retired judges would never be allowed to step in to help out with overload dockets because the voters had not elected them to a current

²⁰ Judge Higginbotham's opinion said the State eliminated the appearance of bias in the present system by creating an elaborate set of rules controlling venue. He also said that no similar system of venue rules exists for subdistricts. 914 F.2d at 651. The point about venue rules is that they provide a set of neutral guidelines to determine whether the case should be tried in one district or another (and before a judge from one district or another), thus preventing arbitrary decisions about the matter to be made by someone interested in favoring one litigant over the other. In a subdistricting system, as under the present system, there would be a neutral system of assigning cases to judges, thus preventing arbitrary case-assignment decisions from being made by someone interested in favoring one litigant over the other. Once a decision regarding venue is made according to neutral guidelines, the State of Texas has indicated no concern about having a judge elected in Dallas hear a case involving one litigant from Dallas and another from Houston. Similarly, once a case assignment is made according to neutral guidelines, the State will have no difficulty with a judge elected out of one subdistrict hearing a case involving one litigant from that subdistrict and one from another.

term. Interim judges could not be appointed to fill vacancies prior to an election.²¹ Thus, it is clear that the state's interest in the legitimacy of judicial decisionmaking would not be impaired by subdistricting.

All of this indicates that, even if subdistricting were the issue before this Court, the state's interests would not be undermined by the use of a subdistricting remedy.

C. No "Single-Member Office" Exception Removes Trial Judges from the Coverage of Section 2.

The reasoning of the "single-member office" exception articulated by a 2-1 panel majority of the Second Circuit in *Butts v. City of New York* has never been adopted by this Court, and it seems doubtful it would be.²² Even if it were, it is inapplicable here. By its own terms, the *Butts* "single-member office" exception applies only to offices of which there is one office holder in the jurisdiction, such as a mayor. This notion is applicable to at-large elections only in the logical sense that a mayor cannot be elected other than at-large.

²¹ Subdistricts were adopted as a court-ordered remedy in the Section 2 case involving trial judges in Mississippi, *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). A number of black judges were elected as a result, but there is no evidence that the Mississippi judicial system has suddenly become infused with a threat to what Judge Higginbotham called "the fact and appearance of independence and fairness."

²² In *Butts*, the panel majority said runoff requirements for what it called "single-member offices," such as mayor, may not be challenged under Section 2. This holding is inconsistent with the language of Section 2 and the legislative history. As the Solicitor General has stated, the language of Section 2 makes no exception for majority vote runoff requirements "either for single member offices or other types of elected positions." Brief for the United States as Amicus Curiae in *Whitfield v. Clinton*, No. 90-383 (pet. for cert. denied 2/25/91), at 11. The Senate Report accompanying the 1982 amendment indicates that Section 2 applies to majority vote runoff requirements. S. Rep. at 6, 10, 22, 29-30. Thus, it is doubtful that *Butts* was correct when it said runoff requirements for "single-member offices" are immune to Section 2.

By contrast, there are a number of trial judges elected in each of the challenged judicial election districts in Texas. It is not necessary that they all be elected by an at-large, winner-take-all system. The fact that they often exercise decisionmaking power by themselves does not make them "single-member offices" for purposes of *election*. Under the Voting Rights Act, it is the electoral structure that is important, and Congress has never indicated that the function of the office can insulate racially exclusionary election schemes from challenge. If function could preclude coverage of the Act, discriminatory at-large elections for city commissions, in which each commissioner exercises independent decisionmaking authority over a particular area of city operations, might be shielded from challenge. See, e.g., *Buchanan v. City of Jackson*, 708 F.2d 1066, 1067-68 (6th Cir. 1983). That has never been the law.

The "single-member-office" argument, then, as applied to judicial districts that have multiple judgeships, is merely another way of expressing the conclusion that trial judges should not be elected from subdistricts. This remedial concern, again, is not dispositive of Section 2's coverage.

D. The Concurrence Failed to Consider the Interests in Non-Discriminatory Elections That Congress Attempted to Further Through Section 2, and Instead Focused Exclusively on the Issue of Responsiveness.

Judge Higginbotham's balancing of the state's alleged interests was further skewed by his failure to perceive the true nature of the countervailing interests in non-discriminatory elections that Congress has sought to vindicate through Section 2. The Higginbotham concurrence embraced the erroneous notion that Section 2's sole function is to increase minority impact on the day-to-day decisions of governmental officials, including judges, and concluded that subdistricting would not help most mi-

nority *litigants* appear in front of minority judges. 914 F.2d at 649-50.²³

To the contrary, Section 2's purpose is not simply to increase the extent to which minority interests are considered in government decisions—in this instance, decisions involving individual litigants—but is to give minority voters a fair opportunity to elect candidates “of their choice” (to use the language of Section 2). When voters—be they white, black or Hispanic—vote for judicial candidates, they rarely vote in the expectation that they someday will appear as litigants before the judges who are elected. Instead, they vote for the candidates they believe will do the best job of administering justice. The purpose of Section 2 is to give minority voters a meaningful voice in those electoral decisions.

The legislative history of the 1982 amendment made it clear that the responsiveness of governmental officials to minority interests is a factor of secondary importance in Section 2 cases, and said that “[u]nresponsiveness is not an essential part of plaintiff's case” under Section 2. S. Rep. at 29 and n.116 (1982). Thus, even if minority interests are already fully taken into account in governmental decisions, Section 2 prohibits an election system that denies minority voters an equal and fair opportunity to elect candidates of their choice.

In summary, Judge Higginbotham is wrong to suggest that the state's legitimate interests will be undermined by subdistricting. Moreover, he fails to balance those interests against the fundamental concern protected by Section 2, and that is the right of minority voters to elect candidates of choice free from racially discriminatory election structures.

²³ Of course, as a result of the present election districts, very few litigants, minority or white, appear in front of minority judges because there are so few.

III. NOTHING INDICATES CONGRESS INTENDED TO EXCLUDE FROM SECTION 2'S COVERAGE AT-LARGE JUDICIAL ELECTIONS FROM DISTRICTS CO-EXTENSIVE WITH THE JURISDICTIONAL AREA SERVED BY THE JUDGES ELECTED.

Judge Clark's concurrence on behalf of himself is similar to Judge Higginbotham's in that Judge Clark believes the state's interest in what he calls "due process neutrality" should immunize from Section 2's coverage all elections from judicial districts that are geographically coextensive with the jurisdictional area served by the judges elected. Judge Higginbotham would carry that principle forward to exclude all trial judge elections. By contrast, Judge Clark would use it to exclude elections for both trial and appellate judges if the election district and the jurisdiction are coextensive, while he leaves open the possibility of a Section 2 challenge to an election district, either trial or appellate, smaller than the jurisdictional area served by the judge elected.

There is absolutely no reason to believe Congress intended such an exception to Section 2's coverage. One of the primary electoral devices Congress intended to combat with Section 2 is discriminatory at-large elections. S. Rep. at 30. Section 5, of course, covers at-large elections where electoral base and jurisdiction are equivalent, and it is doubtful Congress intended to exclude from Section 2's scope a type of election covered by Section 5. See *Georgia Board of Elections v. Brooks*.

Moreover, Judge Clark's view suffers from the same problems as Judge Higginbotham's. They are both based on a belief that the election district and the jurisdictional area must be equivalent to insure what Judge Clark calls "due process neutrality." As mentioned in the discussion of Judge Higginbotham's opinion, that view erroneously assumes that subdistricting is the only available remedy. Also, as stated previously, it wrongly assumes that the state's interest in due process neutrality will be undermined by subdistricts even if they were the only available

remedy, and it fails to consider the overriding congressional purpose of eliminating racial discrimination in all elections.

For all of these reasons, Judge Clark's reasoning, like Judge Higginbotham's, provides no basis for sustaining the judgment below in the *LULAC* litigation.

CONCLUSION

For these reasons, the judgment of the court below in these cases should be reversed.

Respectfully submitted,

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March 4, 1991

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APPENDIX

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Lamar P. Pugh

December 28, 1990

Honorable John V. Parker
Chief Judge
United States District Court
Middle District of Louisiana
707 Florida Street
Baton Rouge, Louisiana 70801

Re: Plaintiffs' Motion to the Three-Judge Court To Prevent Judges from Holding Office in the Judgeships for Which No Candidate was Elected Because the Injunction of the United States Supreme Court
Clark v. Roemer, No. 86-435, Section A
U.S. District Court for the Middle District of Louisiana

Dear Judge Parker:

I have been able to determine that the only individual judges who might be affected by the outcome of the captioned motion would be:

Judge James H. Boddie, Jr.
Fourth Judicial District, Division G
Judge Arthur J. Planchard, Jr.
Fourteenth Judicial District, Division E
Judge Charley Quienalty
Fourteenth Judicial District, Division G

Commercial National Tower, Suite 2100
333 Texas Street, Shreveport, Louisiana 71101-5302
Telephone (318) 227-2270 • Telecopier (318) 227-2273

2a

Judge Hawsey, who would have otherwise been affected, retired, he is no longer representing his former district, however, he is serving as an ad hoc judge without a district designation on a series of asbestos cases.

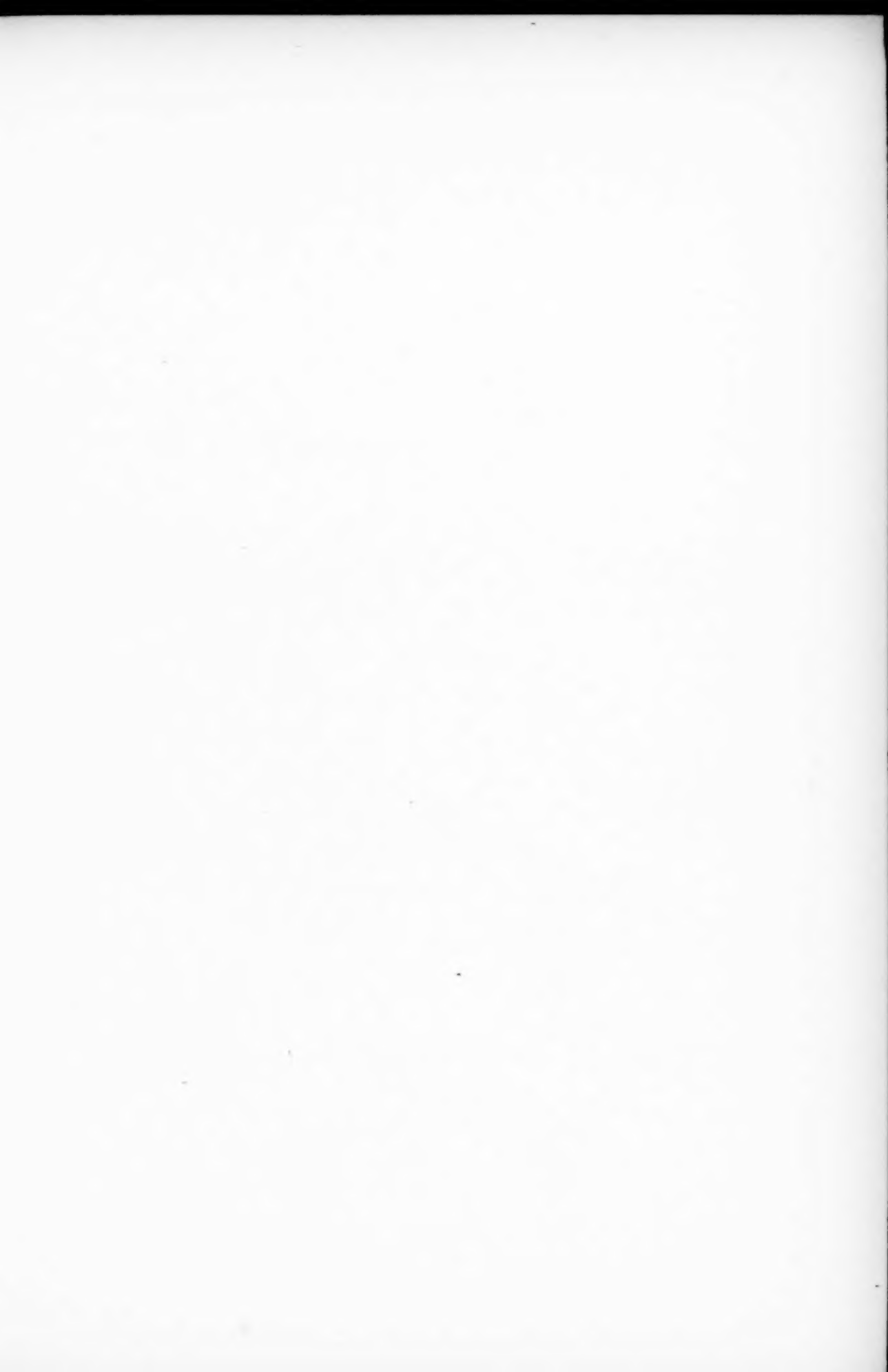
By copy of this letter to Mr. McDuff and Mr. Johnson, I am advising him of my findings.

Yours very truly,

/s/ Robert G. Pugh
ROBERT G. PUGH

RGP/mp

cc: Robert B. McDuff, Esquire
Ernest L. Johnson, Esquire



MAR 4 1991

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSN., et al.

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.

Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

*On writ of certiorari to the United States Court of
Appeals for the Fifth Circuit*

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF THE AMERICAN JUDICATURE
SOCIETY AS *AMICUS CURIAE* IN
SUPPORT OF NEITHER PARTY**

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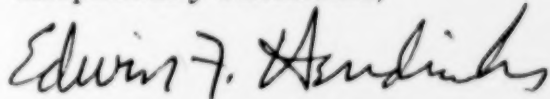
**MOTION FOR LEAVE TO FILE BRIEF OF THE
AMERICAN JUDICATURE SOCIETY AS AMICUS
CURIAE IN SUPPORT OF NEITHER PARTY**

The American Judicature Society was founded in 1913 by Roscoe Pound, John H. Wigmore, and others dedicated to improving the administration of justice throughout the United States. Among its goals, the Society seeks to improve the quality and diversity of state-court judges by promoting merit selection as the method for choosing such judges. The Society has a national membership.

It seeks leave to file an *amicus* brief in this case to call to the Court's attention important facts about merit selection which has been adopted in whole or in part by a majority of states as the method for selecting highly qualified candidates to fill judicial offices.

The Society has undertaken a good faith effort to obtain the consent of all parties necessary to file this brief without motion. Although all parties have orally consented to the filing of this brief, the Society had not received all such consents in writing prior to the printing of the brief. Should the Society receive such written consents prior to filing, it will file the consents with the clerk's office. The Society has not yet received the written consents of The League of Latin American Citizens, Jesse Oliver, and the Attorney General of Texas.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Edwin F. Hendricks". The signature is fluid and cursive, with the first name "Edwin" and last name "Hendricks" clearly distinguishable.

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March 4, 1991

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*On writ of certiorari to the United States
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**BRIEF OF THE AMERICAN JUDICATURE SOCIETY
AS AMICUS CURIAE IN SUPPORT OF
NEITHER PARTY**

INTEREST OF AMICUS CURIAE

The American Judicature Society was founded in 1913 by Roscoe Pound, John H. Wigmore, and others dedicated to improving the administration of justice throughout the United States. Among its goals, the Society seeks to improve the quality and diversity of state-court judges by

promoting merit selection as the method for choosing such judges.

The cases before the Court do not concern application of the Voting Rights Act to the merit-based selection of judges, and the Society takes no position on the application of the Act to the selection of judges through at-large, competitive elections. But because the Court's decision might be used to question the validity of merit selection systems now being used in a majority of the states, the Society files this *amicus* brief to inform the Court of the operation and spread of merit selection systems and to explain why the Court should not decide the present controversy in a manner that implicates judicial choice by merit selection.

SUMMARY OF ARGUMENT

Merit selection provides a superior method for selecting state judges. Merit selection systems require state executives to appoint judges from a short list of only the most highly qualified candidates nominated by non-partisan commissions. This procedure increases the quality of state court judges, makes them less susceptible to political influences, results in greater representation of minorities and women on state court benches, and enhances the legitimacy of the courts in the eyes of the public. The benefits of merit selection have led thirty-three states to adopt some form of merit selection in the last fifty years.

The Voting Rights Acts does not apply to merit selection procedures because such procedures are not elective. A system under which the state executive makes judicial appointments from a pool of qualified candidates, as to which citizens have no elective voice, simply does not result in voters of one class receiving "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973 (1988). And, although many merit selection systems grant the public a form of popular

veto over judges through periodic retention elections, neither do such elections result in the election of public representatives within the meaning of the Act because Judges removed through retention elections are replaced by executive appointment, not by popular election. Therefore, in deciding the cases before it, the Court should do nothing to suggest that the Voting Rights Act applies to merit selection of judges by the states.

ARGUMENT

A. Merit Selection Is A Superior Method For Selecting State Judges.

Albert Kales, the Society's first director of research, formulated the original merit selection proposal in 1914. For the next several years the Society refined and expanded the proposal and it was subsequently endorsed by The American Bar Association in 1937. In 1940, Missouri became the first state to adopt merit selection. Under its most traditional form, merit selection calls upon a non-partisan nominating commission to select qualified candidates for a judicial opening. The state executive is required to fill the judicial vacancy from among the limited group of candidates nominated by the commission. Under most merit plans, when the judicial term of office expires and at regular intervals thereafter, the judge is subject to a retention election at which he or she runs unopposed on the basis of his or her judicial record. If the judge is not retained by the public, the vacant seat is filled by appointment through the same merit selection process. American Judicature Society, *Model Judicial Selection Provisions* (1985). This approach to judicial selection preserves the appointment prerogative of the executive and the safeguards of public approval, while ensuring that persons appointed are well qualified for the bench.

Merit selection provides many benefits, the foremost being an enhanced quality of state judges. Non-partisan commissions which nominate judicial candidates under

merit selection systems are charged with seeking out the best judicial talent available. State executives must make their appointments from candidates so identified. This process, while not eliminating political considerations entirely, places greater emphasis on judicial qualifications than an unfettered political appointment system or a general competitive election. A 1979 poll of jurisdictions with merit selection revealed, almost without exception, that judicial quality had improved. American Judicature Society, *Judicial Selection Update: How Commissioners Rate Their Own Judicial Selection Plans* (1979).

Merit selection also makes the judiciary more independent from political influences and public pressure. Judges chosen through merit selection need not initially engage in the overtly political activities of judges selected through public elections, such as campaigning for office, aligning themselves with particular political parties, and soliciting campaign funds. And, because judges appointed through merit selection generally have a greater assurance of extended tenure, political factors and public opinion play less of a role in their decisions.

Merit selection systems also provide more frequent judicial opportunities to minorities and women. Studies recently completed by the Society show that of the 20 black jurists currently serving on state courts of last resort, 10 were chosen through merit selection, 7 through pure appointment by the executive, 2 through legislative appointment, and 1 through popular election. American Judicature Society, *Black Justices Currently Serving On State Courts of Last Resort: Methods of Initial Selection* (September 1990). See also, Fund for Modern Courts, Inc., *Success of Women and Minorities in Achieving Judicial Office: The Selection Process* 69 (Dec. 1985) ("merit selection produced the highest percentage of women and minorities to reach the bench of the six methods studied."). In Florida, where appellate judges are chosen by merit selection and trial judges are elected, "nineteen out of twenty-three black judges . . . came to the bench through the merit selection

process." Overton, *Trial Judges and Political Elections: A Time For Re-examination*, 2 U. Fla. J. of L. & Pub. Pol'y. 9, 20 (1988-89).

Similarly, of the 35 women currently serving on state courts of last resort, 17 achieved the bench by merit selection, 10 by executive appointment, 4 by legislative appointment, and 4 by public election. American Judicature Society, *Women Justices Currently Serving on State Courts of Last Resort: Methods of Initial Selection* (Sept. 1990); Fund for Modern Courts, Inc., *supra*. In Florida, 41 of 71 women judges came to the bench through merit selection appointment. Overton, *supra*, at 20.

The benefits of merit selection are evidenced by the number of states that have adopted such a system in the last half-century. Missouri began the shift when it established a merit selection system in 1940. Since then, thirty-three states and the District of Columbia have adopted a form of judicial merit selection to choose some or all of their judges.¹ Indeed, with only one exception, every state which has changed its judicial selection system in the last forty-one years has changed to merit selection.²

B. Section Two Of The Voting Rights Act Does Not Apply To Merit Selection.

The gravamen of a claim under the Voting Rights Act is that members of a protected class have "less opportunity than other members of the electorate to participate

¹ The states include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

² The lone exception is Georgia, which switched from partisan to non-partisan elections in 1983.

in the political process and *to elect representatives of their choice.*" The Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1988) (emphasis added). While the Court may determine in these cases that the Voting Rights Act applies to contested, at-large judicial elections, the Act cannot apply to the merit selection of judges. Merit selection systems grant the electorate no direct voice in filling judicial vacancies. Rather, judges are appointed by the executive branch from a pool of candidates nominated by a non-partisan commission. No voter in a protected class has less say about the choice of a judge than other voters. Thus, the Voting Rights Act, by its very terms, has no application to merit-based judicial appointments.

Lower federal courts have so held. In *Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988), Illinois voters challenged state methods for selecting judges under section two of the Act. The court found that the complaint stated a claim as to judges who were selected through public elections, but dismissed the claim as to judges who were appointed. The court recognized the fundamental distinction under the Act between systems that fill vacancies through public elections and those that fill vacancies through appointment:

By its very terms, the Act extends only to mechanisms involved in the election of representatives. However, the people of Cook County do not elect the Associate Circuit Court judges; they are appointed by the regular Circuit Court judges. Because Associate Circuit Court judges are not elected representatives of the people within the plain meaning of the Act, we hold that the plaintiffs cannot challenge the appointment of Associate Circuit Court judges. Though the plaintiffs contend that full relief requires reappointment of all Associate Circuit Court judges by properly elected Circuit Court judges, we cannot extend coverage of the Voting Rights Act beyond its

terms. The Voting Rights Act covers elected officials only. Associate judges are appointed officials.

Williams, 696 F. Supp. at 1568-69; *see also Irby v. Virginia State Board of Elections*, 889 F.2d 1352, 1357-58 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 2589 (1990) (considerable doubt as to whether section 2 applies to appointive offices); *Searcy v. Williams*, 656 F.2d 1003, 1010 (5th Cir. Unit B 1981), *aff'd mem. sub nom. Hightower v. Searcy*, 455 U.S. 984 (1982) (appointive system for school board did not implicate Voting Rights Act); *Irby v. Fitz-Hugh*, 693 F. Supp. 424, 435 (E.D.Va. 1988) (same). The Society believes that the Act was applied correctly in *Williams*, and requests that this Court say nothing in its disposition of the cases at bar to suggest that the Act applies to appointive systems such as merit selection.

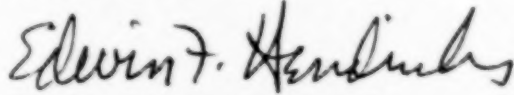
C. The Voting Right Act Should Not Be Applied To Retention Elections.

Merit selection is an appointive process, but many merit selection systems provide the public with a voice in retaining judges through popular vote. Retention elections function as a kind of popular veto, allowing the public to dismiss a judge who has already been appointed but providing voters with no right to select judges of their choice. Judges dismissed through retention elections are replaced by judges appointed by the executive through the merit-based selection process, with the voters having no voice in the candidates nominated or selected. Thus, retention elections do not deny protected classes the right "to elect representatives of their choice" within the terms of the Voting Rights Act, 42 U.S.C. § 1973 (1988). Because the retention aspect of merit selection systems is not before the Court in the present cases, the Society requests that the Court say nothing in its disposition of these cases which would suggest that retention elections are subject to the provisions of the Voting Rights Act.

CONCLUSION

For the above reasons, the American Judicature Society respectfully requests the Court not to implicate judicial choice by merit selection in its disposition of these cases.

Respectfully submitted,

A handwritten signature in black ink, reading "Edwin F. Hendricks". The signature is written in a cursive style with a large, stylized "H" and "S" at the end.

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March 4, 1991



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CLERK OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

HOUSTON LAWYERS' ASS'N, ET AL.,

v.

Petitioners,

THE ATTORNEY GENERAL OF TEXAS, ET AL.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,

v.

Petitioners,

THE ATTORNEY GENERAL OF TEXAS, ET AL.

RONALD CHISOM, ET AL.,

v.

Petitioners,

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA

v.

Petitioner,

CHARLES E. ROEMER, ET AL.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

I. Whether vote dilution challenges to state judicial elections are so different from traditional vote dilution cases that one cannot reasonably conclude that Congress intended to make judgeships subject to the 1982 amendment.

II. Whether vote dilution remedies are inherently inappropriate for state trial court judges.

III. Whether vote dilution remedies are inappropriate for state court judges because they would undercut the independence of the judiciary and violate the principle of separation of powers.

IV. Whether other possible vote dilution remedies are equally inapplicable ~~and~~ inappropriate in the case of judges.

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Nos. 90-813, 90-974, 90-757 and 90-1032

In The
Supreme Court of the United States
October Term, 1990

HOUSTON LAWYERS' ASS'N, ET AL.,

v. *Petitioners,*

THE ATTORNEY GENERAL OF TEXAS, ET AL.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL.,

v. *Petitioners,*

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RONALD CHISOM, ET AL.,

v. *Petitioners,*

CHARLES E. ROEMER, ET AL.

UNITED STATES OF AMERICA

v. *Petitioner,*

CHARLES E. ROEMER, ET AL.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF GEORGIA
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE STATE OF GEORGIA

The consolidated appeals in this case involve questions concerning the application of vote dilution principles of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, to state judicial elections. Claims of the same sort that are presented in these cases have been asserted against agencies and officers of the State of Georgia. See *Tyrone Brooks, et al. v. State Board of Elections, et al.*, Case No. CV288-146 (S.D. Ga., filed July 13, 1988). The plaintiffs there claim that the existing circuits for electing judges of the State's superior courts, which are the trial courts of general legal, equitable and felony jurisdiction, should be subjected to liability and remedies under Section 2. Specifically, the plaintiffs there claim that the existing circuits should be subdistricted into single member districts; that the State's majority vote requirement should be eliminated; and that incumbent judges should be compelled to run against one another, rather than for separate designated seats.

The outcome of the appeals in the instant case will be of great significance to the resolution of the similar claims pending in the United States District Court for the Southern District of Georgia. Moreover, the outcome of this case would affect whether similar claims might be asserted against other trial courts in the State of Georgia, and whether such claims might also be asserted against the Georgia Court of Appeals and the Georgia Supreme Court.

The State of Georgia thus has the utmost interest in the outcome of the present appeals. Amicus is of the firm belief that the Fifth Circuit Court of Appeals' rulings here

were correct, that they should be affirmed, and that Section 2 of the Voting Rights Act should not be extended to apply vote dilution theories to state judgeships.

The State of Georgia as amicus believes that a thorough statutory analysis and review of the legislative history behind the 1982 amendment to the Voting Rights Act, has been properly made by the Fifth Circuit and by other briefs filed with this Court in support of affirmance. While the State of Georgia agrees with those arguments, they will not be reiterated here. Rather, the State of Georgia wishes to bring to the Court's attention several other matters that amicus believes weigh against the extension of vote dilution principles to state court judgeships, and particularly trial court judgeships.

SUMMARY OF ARGUMENT

It is undisputed that the testimony before Congress concerning the need to amend Section 2 to create a cause of action for vote dilution related *exclusively* to traditional legislative type representative bodies – state legislatures, county commissions, city councils, and the like. Not a single witness before either the House or the Senate Committees that considered the amendment ever suggested that vote dilution principles should be applied to judges *or* that there was any need for such a drastic federal remedy in the case of judgeships.

As the Supreme Court determines whether, in its judgment, Congress intended to apply vote dilution principles to judgeships, the State of Georgia believes that the fact that the matter was never brought to Congress' attention is strong evidence that weighs against a finding that

the new vote dilution principles should apply to this area. Of equal importance, amicus believes that there are such fundamental differences, as a matter of practicality and as a matter of fact, between traditional representative bodies and judicial elections that it is not reasonable to assume that Congress would have applied vote dilution principles to judgeships if Congress had actually considered the question.

While Congress was presented with testimony in 1981 and 1982 that the underrepresentation of minorities on local elected bodies was directly caused by election systems that exclude minorities *because of their race*, the exact opposite is the case in judicial elections around this nation. While it is true that minorities generally are not present on the state court bench – or on the federal bench for that matter – in proportion to their numbers in the general population, the reason for that is not electoral discrimination. Rather, the reason is the relatively lower percentage of minorities who are licensed to practice law and who, as such, are legally qualified to serve as judges. In the State of Georgia, for example, minority candidates have been very successful in seeking election and nomination to judgeships insofar as they have tried to do so. Indeed, the percentage of blacks on the bench actually exceeds their percentage within the Bar. Although it is true that the percentage of blacks on the bench is less than their overall percentage in the population at large, the sole reason for that disparity is their relatively lower numbers in the Bar.

Since the “underrepresentation” of minority judges that the plaintiffs complain about is not the product of the kind of electoral discrimination that was the basis of Congress’ action in adopting the vote dilution statute in

1982, one cannot reasonably assume that Congress would have concluded that it was necessary to impose vote dilution principles on state judiciaries. Doing so would have been a radical intrusion into traditionally state prerogatives.

In addition, as a matter of both theory and practice, vote dilution remedies are inherently contradictory to the functions of the judiciary. The function of a judge is not to "represent" persons by bringing constituents' views to the bench. To the contrary, judges are supposed to apply the law neutrally to the evidence brought before them. While subdistricting remedies allow the voice of minority communities to be manifested more aggressively in the collegial decision making of representative bodies, subdistricting would provide no such benefits to minority voters electing trial court judges. Since trial court judges act individually and each is vested with the full authority of the court, the voters of a subdistrict who might appear in a case before a particular judge would be entirely disfranchised – rather than having some new kind of fuller and more equal "political access" – whenever they appeared before a judge who happened to have been elected from a subdistrict in which the parties did not reside.

Subdistricting judges would have a variety of other undesirable consequences, not the least of which would be the impairment of judicial independence. With judges being subject to frequent reapportionment, incumbent judges would be thrown into the political thicket of redistricting. Redistricting would be performed by state legislatures under the Constitutions of most States, including that of Georgia. Drawing the judiciary into the thicket of their own reapportionment would force state judges into

a level of subservience to state legislators and other political figures that would severely impugn the judiciary's present ability to remain impartial and to render decisions based on the facts and the law presented, rather than on the parties and politics involved.

Other vote dilution principles that might apply to other offices, such as attacks on majority voting or the separation of elections into separate posts for each elected official, are equally inappropriate and inapplicable to judgeships. The State of Georgia may be unique in having had extensive experience with both majority and plurality voting – before 1964 the political parties were allowed to choose their own rule in that regard – and the experience with plurality voting was uniformly negative. The use of separate designated seats for electing judges is particularly important to avoid having incumbent judges running against one another. Requiring incumbent judges to run against one another for open seats would create pressure for those judges to make their records, whether on criminal sentencing or other matters, more prominent and “attention-catching” than that of other judges. Again, the objective of judicial impartiality would be undercut.

ARGUMENT

- I. VOTE DILUTION CHALLENGES TO STATE JUDICIAL ELECTIONS ARE SO DIFFERENT FROM TRADITIONAL VOTE DILUTION CASES INVOLVING LEGISLATIVE BODIES THAT ONE CANNOT REASONABLY CONCLUDE THAT CONGRESS INTENDED TO MAKE JUDGESHIPS SUBJECT TO THE 1982 AMENDMENT.**

Based on an extensive review of the language of the Act and its legislative history, the Fifth Circuit's en banc

decision in these cases concluded that vote dilution claims cannot be brought against judges under the amended Section 2 of the Voting Rights Act. The State of Georgia as amicus curiae agrees entirely with the reasoning of the Court of Appeals and with the arguments made by appellees and other amici in support of affirmance of the Court of Appeals' rulings. See also, C. Cole, *The Voting Rights Act and the Election of Judges*, 14 AM. J. TRIAL ADVOCACY 1, 44-58 (1990). Georgia will not reiterate any of those arguments here, but wishes instead to point out some additional factors that support the conclusion reached by the Court of Appeals.

All parties to these cases agree with one point - applying vote dilution principles to state judgeships would significantly intrude into an area of public policy that traditionally has been the prerogative of the States. That being the case, Congress will not be found to have usurped the States' traditional authority unless the amended Section 2 clearly and expressly states that intent. Before Congress may be deemed to have altered the "usual constitutional balance between the State and Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Will v. Michigan Department of State Police*, 491 U.S. 58, ___, 109 S.Ct. 2304, 2308 (1989). "[I]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." 109 S.Ct. at 2308-09.

The reasoning of the Court of Appeals and the arguments advanced by appellees make it apparent that the

"clear statement" of congressional intent that would be required to impose vote dilution theories on state judiciaries is lacking. But there is another critical factor which also weighs heavily against finding that Section 2 vote dilution theories apply here. That fact, simply put, is that the circumstances surrounding state judicial elections are so different from those that pertain to traditional vote dilution challenges to legislative bodies, that it would be unreasonable to assume that Congress would have made vote dilution principles applicable to judgeships if Congress had faced the question. To the contrary, it is far more likely that, if Congress had made any inquiry into this topic, it would have concluded the exact opposite, that vote dilution principles were both inappropriate and unnecessary in the area of judicial elections.

In enacting the vote dilution provision of the amended Section 2, Congress was concerned with the ability of minority groups to have an opportunity to elect representatives of their choice and to participate meaningfully in the political process. Testimony was given to Congress that at-large elections in some communities foreclosed minorities from having a meaningful role in the political process, and that minority candidates could not be elected because of their race.

The situation is entirely different, as a matter of fact, with the judiciary. To the extent that there is a disparity between the number of minority judges and the percentage of minorities in the general population, that difference arises because the percentage of persons qualified to serve as judges who are minority is much less than the minority percentage in the general population.

In the State of Georgia, for example, the Georgia Constitution requires that superior court judges be members of the Bar for seven years or more. Ga. Const., Art. VI, Sec. VII, Par. II(a). This requirement is typical of what is found in other States. No one has previously alleged that that requirement is somehow arbitrary, racially discriminatory, or illegal, yet it is that requirement alone – and not circuit-wide elections or majority vote requirements – that has determined the relative number of black and white superior court judges sitting at present.

In the State of Georgia, six of 135 incumbent superior court judges are black, or 4.4 percent. This number *exceeds* the percentage of black lawyers in the State of Georgia, which is three percent, and it substantially exceeds the percentage of lawyers who are black *and* who satisfy the minimum seven-year practice requirement.

Furthermore, black candidates who have run for judgeships in Georgia have been very successful. Starting with the most comprehensive elections, there have been three instances where black candidates have run for state-wide appellate courts, one for a seat on the Georgia Supreme Court and two for seats on the Georgia Court of Appeals. *The black candidates defeated white opponents in each of these three state-wide elections.* There have been ten other judicial elections since 1970 in which black and white candidates have opposed one another for the State's major trial courts, and a black candidate won seven of those ten races.¹ In 15 additional elections, black

¹ In another of those ten races, the black candidate was unsuccessful, but neither did he carry a majority of the black voters.

candidates for these trial court judgeships have been elected without opposition.

The majority of all present incumbent superior court judges in Georgia were initially appointed to their positions. These appointments arose either through an initial appointment to a newly created seat or through the appointment of a new judge to an existing position that became vacant in mid-term. Appointments to superior court vacancies have been made by the Governor upon the recommendation of the Judicial Nominating Commission. As a matter of fact, black lawyers who have sought such appointments to superior court positions have enjoyed a success rate substantially higher than that of white applicants.

While the specific facts concerning the election and appointment history of minorities in the other 49 states naturally vary, the pattern exhibited in the State of Georgia is not uncommon in other States. Most significantly, the key question concerning minority "underrepresentation" on the bench in all States is the same. The issue does not relate principally to electoral problems, but to the fact that minority members of the Bar who are available to serve as judges are significantly fewer than the percentages of minorities in the general population.

This key issue that dominates the question of minority representation among judges is closely akin to the "qualified pool" type of issue that is part of this Court's decisions in employment discrimination and other areas. See, e.g., *Ward Cove Packing, Inc. v. Antonio*, 490 U.S. 642 (1989). It is an issue that has nothing whatsoever to do

with the vote dilution questions that were faced by Congress when it enacted the amended Section 2 of the Voting Rights Act in 1982.

The "qualified pools" of candidates for typical representative offices (legislatures, city councils, etc.) in the United States consist of all of those who have the legal qualifications to hold those offices, which generally are citizenship, residency, and some age requirement. Since the qualified pools of minority candidates for those offices, percentage-wise, are essentially the same as the percentage of minorities in the general population, Congress never had to consider this question in enacting the vote dilution principle in 1982. Neither did a single witness before Congress ever address this question in 1981 or 1982.

Had Congress addressed these questions, and had Congress considered the evidence and issues as they relate to the judiciary, it is not reasonable to assume that Congress would have concluded that the same federal legislative relief was necessary for the judiciary as for legislative offices. The basic facts and circumstances are simply too different.

II. VOTE DILUTION REMEDIES ARE INHERENTLY INAPPROPRIATE AND DEVOID OF RATIONAL JUSTIFICATION FOR STATE TRIAL JUDGES.

The remedial theory conceived of in the vote dilution decisions of this Court and the lower federal courts, is the replacement of multi-member districts and at-large elections with single member districts. See, e.g., *Thornburg v.*

Gingles, 478 U.S. 30 (1986). The purpose of that remedy is to allow minority voters who are concentrated in a particular area to elect representatives of their choice. Those minority-chosen officials then carry the views of their constituencies to the public body to which they have been elected, they advocate those views during the collegial decision making of those bodies, and the ultimate public policy decisions of those bodies presumably reflect the input of the minority-chosen candidates. Minority voters benefit from this remedy in that all of the actions of the body are presumably more reflective of and responsive to the concerns and views of the minority community.

The logic of this remedy, however, is wholly inapplicable in the case of trial court judges. State trial court judges do not act collegially as do persons elected to representative bodies, such as state legislatures, city councils, school boards, and other policy setting bodies with general legislative authority. Instead, the entire power and authority of the trial court is vested in each and every trial judge, and when judges preside over cases, they exercise all of that authority without any limitations imposed by any of the other persons who were elected as judges of that court.

As a practical matter, therefore, a minority voter would derive none of the benefits from a subdistricted trial court that he or she would derive from a subdistricted city council or other representative body. Where a minority constituent is a party before a court, the chances are that they would more likely appear, if the court were subdistricted, before a judge that that constituent had no opportunity at all to vote on. Thus, as a practical matter, if subdistricting remedies were applied

to the judiciary, minority voters would not in any way achieve some new or enhanced "equal opportunity to participate in the political process," 42 U.S.C. §1973. More often than not, the voters would instead be entirely disfranchised in connection with those actions of the local courts that might directly and personally impact on them.

This situation is entirely different from traditional cases involving representative government where minority citizens' votes are manifested in the electoral body through their elected representative. Those representatives, in turn, cast their votes on *every single* action of the legislative body. Those bodies cannot act in any other way, except through that collegial process that involves the equal actions of each of the elected representatives. That cannot occur with elected trial court judges because the functions of a court and representative bodies are so different, and judges act without any of the collegial constraints that characterize representative bodies.

III. VOTE DILUTION REMEDIES ARE PARTICULARLY INAPPROPRIATE FOR STATE COURT JUDGES BECAUSE THEY WOULD SEVERELY UNDERCUT THE INDEPENDENCE OF THE JUDICIARY AND THE SEPARATION OF POWERS PRINCIPLES THAT ARE FOUND IN THE CONSTITUTIONS OF ALL 50 STATES.

Separation of the powers of the three branches of government is fundamental to the American concept of government, both on the federal and state level. Each of the 50 state Constitutions incorporates notions of this sort, just as does the federal Constitution. See *Marbury v. Madison*, 5 U.S. 137 (1803). As a practical matter, however,

vote dilution remedies would severely undercut the independence of state judiciaries and, in turn, undermine the principle of separation of powers.

If vote dilution notions were imposed on state judiciaries and traditional subdistricting remedies arose, the political independence now enjoyed by state judiciaries would be destroyed. With judges elected from electoral subdistricts, reapportionment would be required for those subdistricts on a continuous basis. Not only would reapportionment be required with each decennial census, reapportionment would also be required on those intervening occasions when new judges were added to a court on account of increased caseloads. The court's subdistricts would have to be adjusted to reflect each new judgeship. In the metropolitan areas, for example, where judgeships are typically added each year or so, reapportionment would literally be an annual affair.²

As a practical matter, reapportionment of judicial subdistricts would be the function of the state legislature

² While the Fourteenth Amendment does not appear to require equalization of the number of judges from circuit to circuit based on population, because the number of judges has historically been based on caseload, *New York Trial Lawyers v. Rockefeller*, 267 F.Supp. 148 (S.D.N.Y. 1967); *Buchanan v. Rhodes*, 249 F.Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3 (1966), that situation is entirely different from what would pertain with subdistrict remedies for vote dilution. With electoral subdistricts for a single court, judgeships on that court would no longer be apportioned on the basis of caseload, but rather on the basis of the population of voters within the court's circuit. If Section 2 were so construed to make judges "representatives," it would appear that one person/one vote principles would apply. Hence, decennial and more frequent apportionment would be required.

under the Constitutions of most States, and that would be the case in Georgia. With incumbent judges' districts subject to constant redrawing and political intermeddling by legislators, the independence of the judiciary would inevitably suffer. Our ideal in this country is for judges to make decisions based on their good faith perception of the law and the facts, not on the basis of the political implications and repercussions of their decisions, and not on the basis of how any one or more well-placed individuals might react to their decisions. But it is not realistic to think that a judge could wholly ignore the grave implications of his or her own reapportionment in cases where local legislators might have some interest in the outcome of a case. Since an incumbent judge's continuation in office and very livelihood would be controlled by how districts were drawn and redrawn, the threat to a judge of a punitive reapportionment would be very real. Only a rare person could completely ignore that threat.

Moreover, the interference caused by the political thicket of reapportionment would unfortunately arise frequently in a judge's normal caseload. Members of the legislature would have an interest in a wide variety of cases that routinely come before a State's trial courts. All issues dealing with the State, for example, including the constitutionality of State laws, actions to review administrative decisions, prominent criminal cases and capital cases, and a virtually endless variety of other publicly important cases would potentially demand the attention of one or more legislators. Legislators who might have a personal interest in a case, either as a party, an attorney representing a party, or simply the friend of a party or witness, would create another class of cases where a

judge's independence could be impugned, however subtly, by the fear of irritating a legislator who had reapportionment power over that judge.

These grave problems do not exist with the single-member district remedies imposed in vote dilution cases involving representative bodies. To the contrary, the political give and take of reapportionment is an accepted and proper part of the overall political process involving those bodies. But it would be antithetical to our concept of an independent, fair-minded judiciary acting impartially based on the law and the facts before the court.

IV. POSSIBLE VOTE DILUTION REMEDIES OTHER THAN SUBDISTRICTING ARE EQUALLY INAPPLICABLE AND INAPPROPRIATE IN THE CASE OF JUDGES.

While the State of Georgia understands that the issues before this court are the strict application of Section 2 to judges, and the impropriety of applying subdistricting remedies to judges, amicus would also point out that other remedies that have been considered in voting cases are equally inappropriate. One such remedy, the replacement of majority vote requirements with plurality requirements, has been sought in several recent cases by private litigants and by the Department of Justice. See, e.g., *Brooks, et al. v. Harris, et al.*, Case No. 1:90-CV1001-RCF (N.D. Ga., filed May 8, 1990); *United States of America v. State of Georgia, et al.*, Case No. 1:90-CV-1749-RCF (N.D. Ga., filed August 9, 1990). As a practical matter, however, majority vote requirements, while having little if any adverse impact on minority voters, serve compelling public interests.

It may be that the State of Georgia has unique experience in that regard because, prior to the adoption of a new and comprehensive Election Code in 1964, political parties had the option of using plurality voting or majority voting in their primary elections. Both practices were thus present in various counties throughout the State over the years prior to 1964, at the option of the local political party executive committees. As a practical matter, when the State of Georgia determined that a comprehensive Election Code should be adopted and that this authority should be taken away from the political parties, the evidence was overwhelming that plurality voting had been nothing short of disastrous from the public's point of view. Plurality voting frequently led to the perpetuation in office of unfit or outright corrupt public officials who, although opposed by a majority of the citizenry, could not be removed from office because of the plurality vote principle. Because of the ability of an incumbent, even a corrupt one, to garner a significant number of votes – whether 25 or 35 percent – incumbents proved unbeatable. They simply saw that enough other candidates qualified from different areas around the jurisdiction to successfully split opposition votes. It was not at all unusual in those cases for the incumbents and their associates to pay the qualifying fees for these other candidates. Time after time, public spirited citizens failed in their efforts to remove such people from office, even though the total votes cast by opposition forces constituted a majority of the total votes cast.

The sole argument ever advanced in favor of plurality voting when the issue was debated in 1963 and

1964 in connection with the adoption of the State's comprehensive new Election Code, was that plurality voting was cheaper. A second, runoff election, when required, naturally caused some additional expense. That argument paled by comparison to the public interest in ensuring that the will of the majority was followed and that, in particular, undesirable officials could not be perpetuated in office by plurality voting.

Those courts that have considered challenges to majority voting to date have evidenced clear hostility to the plaintiffs' claims, and for good reason. See, e.g., *Butts v. City of New York*, 779 F.2d 141 (2nd Cir. 1985), cert. denied, 478 U.S. 1021 (1986); *Whitfield v. Democratic Party of Arkansas*, 686 F.Supp. 1365 (E.D. Ark. 1988), aff'd by an equally divided court, 902 F.2d 15 (8th Cir. 1990) (en banc), cert. denied, 111 S.Ct. 1089 (1991). The efforts of various segments of the civil rights community to advance plurality voting under the guise of vote dilution principles is seriously misplaced and is very much contrary to the interests of the public at large, both majority and minority.

The use of separate designated seats (often called "numbered posts") to elect judgeships in Georgia is another practice that has been attacked, on occasion, under the guise of vote dilution principles. This practice is, as a practical matter, necessary to effectuate majority vote principles. In addition, it serves important and salutary purposes in connection with the election of judges.

The use of separate posts for electing each judge of a court ensures that that judge is not put in direct competition before the voters with other members of the court. If

posts were eliminated and judges were thrown into direct competition with one another, that would create highly inappropriate pressure on sitting judges to render rulings that would maximize their public exposure. Judges might feel pressure to impose as great as possible a sentence in criminal cases, for example, so that their sentencing record might not be unfavorably compared to other incumbent judges against whom they would be running.

The maintenance of impartial and independent judges, unaffected by immediate political concerns, is an important consideration that supports using separate designated posts for election of judgeships. Vote dilution principles contained in the new Section 2 of the Voting Rights Act should not be interpreted to undermine these practices.

CONCLUSION

For the foregoing reasons, the reasons advanced by respondents and other amici in their support, and for the reasons stated by the Fifth Circuit Court of Appeals, the State of Georgia respectfully requests that this Court affirm the decisions below.

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Nos. 90-813 and 90-974

In The
Supreme Court of the United States
October Term, 1990

HOUSTON LAWYERS ASSOCIATION, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.

Petitioners,

vs.

ATTORNEY GENERAL OF TEXAS, et al.

Respondents.

On Writ Of Certiorari To The United States Court Of
Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF
OF AMICI CURIAE FLORIDA CONFERENCE OF
CIRCUIT JUDGES, CONFERENCE OF COUNTY
JUDGES OF FLORIDA, AND THE FLORIDA BAR
IN SUPPORT OF RESPONDENTS

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JUDGES OF FLORIDA, AND THE FLORIDA BAR
IN SUPPORT OF RESPONDENTS

The Florida Conference of Circuit Judges, the Conference of County Judges of Florida, and The Florida Bar, by

undersigned counsel, move the Court for leave to file a brief of *amici curiae* in support of Respondents and as grounds therefor would show:

1. The Florida Conference of Circuit Judges is an association of all active and retired circuit judges of Florida which is responsible for making recommendations to the state supreme court to improve the state judicial system.

2. The Conference of County Judges of Florida was created for the purpose of the improvement of the state judicial system.

3. The Florida Bar is an official arm of the Supreme Court of Florida. The Bar consists of all attorneys licensed to practice law in the state. One of the purposes of the Bar is the improvement of the administration of justice.

4. The Conferences and the Bar support the position of Respondents that section 2 of the Voting Rights Act does not apply to elections of trial judges.

5. The Conferences and the Bar request leave to file a brief of *amici curiae* to bring to this Court's attention the detrimental impact which would result in the State of Florida if section 2 of the Voting Rights Act is interpreted to require single-member districts in elections of trial judges, and do not believe that such impact will be presented to the Court by any of the parties currently permitted to file briefs in this action.

6. The Conferences and the Bar have made a good faith effort to obtain the permission of the parties to file a brief, but such permission has been denied by League of United Latin American Citizens. Permission has been

granted by Houston Lawyers' Association, Jesse Oliver, Judge F. Harold Entz, Tom Rickhoff, Susan D. Reed, John J. Specia, Jr., Sid L. Harle, Sharon Macrae, and Michael P. Peden, Bexar County Texas State District Judges, Judge Sharolyn Wood, and the Attorney General of Texas as per accompanying letters.

WHEREFORE, The Florida Conference of Circuit Judges, The Conference of County Judges of Florida, and The Florida Bar respectfully request leave to file a brief of *amici curiae* in support of Respondents.

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BRIEF OF AMICI CURIAE FLORIDA CONFERENCE
OF CIRCUIT JUDGES, CONFERENCE OF COUNTY
COURT JUDGES OF FLORIDA, AND THE FLORIDA
BAR IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

The Florida Conference of Circuit Judges is an entity created by Florida law. Fla. Stat. § 26.55. Its members are all 421 active and all retired circuit judges of the state. *Id.* § 26.55(1). The Conference is responsible for making recommendations to the state supreme court to improve the state judicial system. *Id.* § 26.55(3). The Conference of County Judges of Florida was created by rule of the Supreme Court of Florida with the stated purpose of the "betterment of the judicial system of the State." Fla. R. Jud. Admin. 2.120. Its members are the 242 county judges of Florida. Together the Conferences of Circuit and County Judges constitute the trial judges of Florida. The Florida Bar is an official arm of the Supreme Court of Florida charged with the discipline of all attorneys licensed to practice law in the State of Florida. Fla. Const. art. V, § 15; Rules Regulating The Florida Bar - General Introduction. Among the Bar's chartered purposes is the improvement of the administration of justice. Rules Regulating The Florida Bar 1-2. The issue raised in this case directly impacts upon the quality of legal services that may be accorded the people of Florida and is considered an especially appropriate matter for commentary from The Florida Bar. The Conferences and The Florida Bar have a vital interest in preventing the inevitable harm to the Florida judicial system if 42 U.S.C. § 1973 is interpreted to require subdistricting in the elections of trial judges.

SUMMARY OF THE ARGUMENT

In response to this Court's holding in *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended section 2 of the Voting Rights Act to provide that a violation may be shown by proving a discriminatory effect alone. Congress did not intend that section 2 of the Voting Rights Act as amended apply to trial court judges. The plain meaning of the amendment to the statute controls, thereby obviating the need for resort to the legislative history.

The specified statute provides that a violation is shown if, based on the totality of the circumstances, it is shown that a protected class of citizens has less opportunity than other electors "to participate in the political process" and "to elect *representatives* of their choice." 42 U.S.C. § 1973(b) (emphasis added). At the time of the amendment numerous federal courts had stated that judges are not representatives. Congress is presumed to know of the judicial construction of existing law. Therefore, it must be presumed that Congress was aware when it chose the word "representative" rather than another, broader term, that it was specifying that judges were not to be within the scope of that section of the Act. As will be shown by a review of the relevant case law and specific reference to provisions governing judges in Florida, judges are not "representatives" and are, therefore, not included within the ambit of the Act.

Even if the Act is construed to include judges within its reach, vote dilution claims do not apply to trial judges because such judges hold single-member offices. Since the office of a judge is indivisible, capable of being held by only one person, the electorate cannot be divided into

subdistricts. Therefore, the en banc decision of the Fifth Circuit Court of Appeals should be affirmed.

ARGUMENT

I. THE PLAIN LANGUAGE OF 42 U.S.C. § 1973 EXCLUDES JUDGES

The issue before this Court is whether section 2 of the Voting Rights Act applies to elections of trial judges. For reasons which follow, *amici curiae* respectfully request this Court to affirm the en banc decision of the court below that section 2 does not apply to trial judges.

The Voting Rights Act "is directed at procedures that deny racial minorities a fair opportunity to participate in the electoral process, and not at those that may have the result of reducing the likelihood that a minority will elect its preferred candidate to a single-member office." *Butts v. City of New York*, 779 F.2d 141, 151 (2d Cir. 1985). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). This Court and numerous commentators agree that multi-member districts and at-large voting schemes may prevent minorities from electing the representatives of their choice. *Id.* at 47-48. However, "multimember districts are not per se unconstitutional." *White v. Regester*, 412 U.S. 755, 765 (1973). In the case of judges, multi-member districts are not unconstitutional because judges are not "representatives" and because judges hold single-

member offices. The majority in the lower court accepted the former contention and, therefore, did not reach the latter, which was relied on by the concurrence.

The Voting Rights Act, prior to the 1982 amendments, read as follows:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

42 U.S.C. § 1973 (1975). This Court held that to prove a violation of the Act, minority voters must prove that the challenged voting practice was adopted intentionally for a discriminatory purpose. *Mobile v. Bolden*, 446 U.S. 55 (1980). In response, Congress amended the statute in 1982 to "make clear that a violation could be proved by showing discriminatory effect alone." *Thornburg*, 478 U.S. at 35. The statute as amended reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of

citizens protected by subsection (a) of this section in *that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice*. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis added). The italicized language of subsection (b) is substantially identical, with one glaring exception, to the following italicized language in Justice White's opinion in *White v. Regester*, 412 U.S. at 766:

The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – *that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice*.

Id. (emphasis added). A comparison of the italicized portions of the statute and the opinion reveals that the only significant change is that instead of saying "to elect legislators of their choice," Congress said, "to elect *representatives* of their choice." It is hard to believe that Congress carelessly chose a word to replace "legislators." The fact that Congress chose the word "representatives" instead of some broader term such as "candidates" or "public officials" leads to the inescapable conclusion that Congress did not intend to include judges within the mandate

of the statute. The well-established judicial construction of the term "representatives," at the time of the amendment, did not include judges. *See, e.g., Sagan v. Commonwealth of Pennsylvania*, 542 F.Supp. 880 (W.D. Pa. 1982); *Concerned Citizens v. Pine Creek Conservancy District*, 473 F.Supp. 334 (S.D. Ohio 1977; *Buchanan v. Gilligan*, 349 F.Supp. 569 (N.D. Ohio 1972); *Wells v. Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973); *Holshouser v. Scott*, 335 F.Supp. 928 (M.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807 (1972). Congress is generally presumed to be "knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988). Therefore, presumably Congress knew when using the word "representatives," it would not include judges within the reach of the statute. One cannot assume that Congress made such a choice lightly. Thus, the majority in the court below found it "all but impossible to avoid the conclusion that Congress intended to apply its newly imposed results test to election for representative, political offices but not to vote dilution claims in judicial contests. . . ." *LULAC v. Clements*, 914 F.2d 620, 628 (5th Cir. 1990) (en banc).

The lower court herein concluded that "to suggest that Congress chose 'representative' with the intent of including judges is roughly on a par with suggesting that the term *night* may, in a given circumstance, properly be read to include *day*." *Id.* at 629. Given the clarity of the statute, the majority stated, "In the words of Justice Frankfurter, writing for a unanimous court in *Greenwood v. United States*, it appears to us that 'this is a case for applying the canon of construction of the wag who said,

when the legislative history is doubtful, go to the statute.' 350 U.S. 366, 374 (1955)." *Id.* at 630.

The unremarkable notion that judges are not representatives accords with traditional notions of the role of judges in American government. This is reflected in the cases decided before the 1982 amendment which conclude that judges are not representatives. In holding that the one-man, one-vote rule does not apply to judges, a Louisiana district court, in a decision affirmed by this Court, cited the purpose of the rule as being "to make sure that each official member of an elected body speaks for approximately the same number of constituents." *Wells v. Edwards*, 347 F.Supp. at 455; see also *Concerned Citizens v. Pine Creek Conservancy District*, 473 F. Supp. 334, 337 (S.D. Ohio 1977) (quoting *Wells*). The court concluded that since judges do not speak for constituents, the one-man, one-vote rule does not apply to the judiciary. *Wells*, 347 F.Supp. at 455. "The state judiciary is not responsible for achieving representative government." *Buchanan v. Gilligan*, 349 F.Supp. 569 (N.D. Ohio 1972). "Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes v. Fortson*, 234 F.Supp. 575, 577 (N.D. Ga. 1964); see also *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880, 882 (W.D. Pa. 1982) (quoting *Stokes*).

An examination of Florida provisions governing judges illustrates that judges are not intended to be "representatives." The Code of Judicial Conduct governing Florida judges recognizes the appropriate role of judges. The Code, based on the American Bar Association Code

of Judicial Conduct, adopted by the Supreme Court of Florida in 1973, is replete with admonitions against partiality on the part of judges. *In re The Florida Bar – Code of Judicial Conduct*, 281 So. 2d 21 (Fla. 1973). Canon 1 provides:

An *independent* and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and *independence* of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id. at 23 (emphasis added). Canon 3 sets forth more explicitly the requirement that judges *not* be responsive to constituents: "A judge should be faithful to the law and maintain professional competence in it. *He should be unswayed by partisan interests, public clamor, or fear of criticism.*" *Id.* at 24 (emphasis added). Thus, partisan politics must play no role in the decision making process of a judge. This ideal prompted the lower court herein to note: "To describe the judge's office merely as 'not a representative one' is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge *does* represent anyone, he is not a judge but a partisan." *LULAC*, 914 F.2d at 628. Additionally, the permissible campaign conduct of judicial candidates is circumscribed by the Code:

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

* * *

should not make pledges or promises of conduct in office other than the faithful and *impartial* performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

281 So. 2d at 32 (emphasis added). Thus, a judicial candidate may not properly campaign based on a promise to represent any particular constituency or viewpoint. A judge makes only one campaign promise and that is that he will remain impartial at all times. Therefore, he cannot possibly be said to "represent" *any* group of people, minority or otherwise. No group is entitled to be "represented" by a judge; therefore, no group has the right to elect a judge of its choice.

In Florida, supreme court justices and district court of appeal judges are appointed. Circuit and county judges are currently elected, pursuant to the Florida Constitution. Circuit judges have been elected since 1942. County judges were elected as early as 1885. Even though some Florida judges are elected, Florida has taken steps to reduce the political aspects of judicial elections. Florida law provides that such elections must be nonpartisan. Fla. Stat. § 105.011(2). Reference to political party affiliation is prohibited on the ballot for judicial office. Fla. Stat. § 105.043(3). Candidates for judicial office may not:

- (1) Participate in any partisan political party activities, except that such candidate may register to vote as a member of any political party and may vote in any party primary for candidates for nomination of the party in which he is registered to vote.
- (2) Campaign as a member of any political party.
- (3) Publicly represent or advertise himself as a member of any political party.
- (4) Endorse any candidate.
- (5) Make political speeches other than in his own behalf.
- (6) Make contributions to political party funds.
- (7) Accept contributions from any political party.
- (8) Solicit contributions for any political party.
- (9) Accept or retain a place on any political party committee.
- (10) Make any contribution to any person, group, or organization for its endorsement to judicial office.
- (11) Agree to pay all or any part of any advertisement sponsored by any person, group, or organization wherein the candidate may be endorsed for judicial office by any such person, group, or organization.

Fla. Stat. § 105.071. Violation of the statute is a first degree misdemeanor. *Id.* It is also a second degree misdemeanor for any political party or partisan political organization to "endorse support, or assist any candidate in a campaign for election to judicial office." Fla. Stat. § 105.09. A federal district court has held Fla. Stat.

§ 105.09 unconstitutional. *Concerned Democrats v. Reno*, 458 F.Supp. 60 (S.D. Fla. 1978), *rev'd on other grounds*, 601 F.2d 891 (5th Cir. 1979). Although the district court held that Florida had a compelling interest "in maintaining the non-partisan qualities of its [judicial] elections," the court held that the state had failed to use the least intrusive means to achieve that goal. The court's comments on the state's interest in nonpartisan judicial elections are enlightening. The Florida Attorney General's office had argued that "the State's interest was in maintaining the integrity and impartiality of the state judiciary." *Id.* at 64. The district court agreed, stating:

There can be no question that the state has a vital interest in assuring that its judges are free from direct political pressure; that they can render decisions independent of political ramifications; and that they can discharge their duties free from the pressure, sometimes subtle and sometimes otherwise, that can be applied by political groups.

The court further noted the existence of "an obvious interest to both the public and the Legislature in having judicial candidates free of the appearance of impropriety," and concluded that the "appearance of partisanship will hardly foster public confidence in the courts." *Id.* at 65.

That Florida and other states have provided for election of some judicial officials does not signify that such elected officials must, therefore, be representatives. The interests of all groups participating in elections of judges are the same; the electorate seeks judges who will comply with traditional requirements of honesty, integrity, and impartiality. Judicial elections are not held to give any

group the opportunity to have its partisan views represented. Rather, judicial elections "assure the public that the judicial function will be kept accountable to the common sense of the electorate." *LULAC*, 914 F.2d at 632, (Clark, C.J., concurring specially). In judicial elections, "[i]t is expected that candidates who lack training or a reputation for honesty or sound intellect will not be elected. In like manner, those who are indolent, will not decide cases, or decide erratically will not be re-elected." *Id.* Thus, the needs of all voters are identical. The goal of judicial elections is the attainment of a qualified and impartial judiciary. Requiring subdistricting in judicial elections does nothing to further that goal; in fact, subdistricting has exactly the opposite effect and creates judges who are partisans, chosen not for their qualifications or integrity, but for their willingness, as perceived by the electorate, to represent a particular point of view or a particular geographical region.

In addition, the Florida judicial elections have been made less political by the creation of judicial nominating commissions and judicial qualifications commissions.

The judicial qualifications commission is:

vested with jurisdiction to investigate and recommend to the Supreme Court of Florida the removal from office of any justice or judge whose conduct . . . demonstrates a present unfitness to hold office, and to investigate and recommend the reprimand of a justice or judge whose conduct . . . warrants such a reprimand.

Fla. Const. art. V, § 12(a). The judicial qualifications commission is composed of six judges (two district court of appeal judges, two circuit judges, and two county

judges), two electors who are attorneys, and five electors who are not attorneys. The judges are chosen by their respective courts; the attorneys are chosen by the governing board of the Florida Bar and the lay people are appointed by the governor.¹ *Id.* All members of the commission who are not subject to impeachment may be suspended by the governor and removed by the senate. Fla. Const. art. V, § 12(c), art. IV, § 7.

The commission is empowered to adopt its own rules, which "may be repealed by general law enacted by a majority vote of the membership of each house of the legislature." Fla. Const. art. V, § 12(d). The commission's proceedings are confidential until the filing of formal charges with the clerk of the supreme court. *Id.* Once a formal charge is filed all proceedings are public. *Id.* With seven members concurring, the commission may "recommend to the supreme court the temporary suspension of any justice or judge against whom formal charges are pending." *Id.* Such suspension may be with or without compensation. *Id.* § 12(f). The supreme court may, upon recommendation of two-thirds of the commission members, reprimand, remove, or involuntarily retire a justice

¹ The constitution further provides that the members of the commission serve staggered terms not to exceed 6 years and that no member of the commission except a justice or judge is eligible for state judicial office while a member of the commission and for 2 years thereafter. Nor may members of the commission "hold office in a political party or participate in any campaign for judicial office or hold public office." Fla. Const. art. V, § 12(b). As an exception to the last rule, "a judge may participate in his own campaign for judicial office and hold that office." *Id.* The commission elects one of its members as chairman. *Id.*

or judge. Fla. Const. art. V, § 12(f). The constitution provides that "Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness for office." *Id.*

Another effort to reduce the political aspects of Florida judicial elections has been the creation of the judicial nominating commissions which are responsible for nominating candidates to fill vacancies on the supreme court, district courts of appeal, circuit courts and county courts. Fla. Const. art. V, § 11. A separate judicial nominating commission exists "for the supreme court, each district court of appeal, and each judicial circuit for all trial courts within the circuit." Fla. Const. art. V, § 11(d). The judicial nominating commission at each level of the court system is responsible for establishing its rules, which "may be repealed by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring." *Id.* The commission's proceedings, except for deliberations, are public. *Id.*

The historical development of the judiciary in Florida has "been accompanied by a steady diminution in political influence of the general population and the elective legislative and executive branches of government in judicial matters and a steady rise in the influence of the judiciary. . . ." Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 Stetson L. Rev. 1, 40 (Fall 1989). Little concludes that "accountability of the judicial branch of state government has gradually been transferred away from the electorate

and its elected representatives to the supreme court and the Florida Bar." *Id.* at 41.

The state of Florida has a substantial interest in maintaining circuit-wide and county-wide election of judges. "The history of the judicial article [of the Florida Constitution] suggests that at least from immediate post-civil war times onward, the judiciary has frequently been strained to cope with demands for access to courts." Little, *supra*, at 37.² Multi-judge circuits have been authorized in Florida since 1933, which "increased the flexibility of the legislature to adjust the numbers of circuit judges as required by changed demands on the court." *Id.* at 22.

The Florida experience, therefore, reflects a trend, presumably not unique among the states, toward reducing political aspects of the judiciary. The creation of single-member districts in judicial elections would be anathema to the ideal of a nonpartisan, impartial, and independent judiciary.

II. VOTE DILUTION CLAIMS DO NOT APPLY TO JUDGES WHO HOLD SINGLE-MEMBER OFFICES

The use of at-large elections rather than single-member districts "may have the effect of denying areas with large concentrations of minority voters the opportunity to pool their strength and elect members of their class from

² The Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Fla. Const. art. I, § 21.

such areas." *Butts v. City of New York*, 779 F.2d at 148. Even if judges are included within the reach of section 2 of the Voting Rights Act, vote dilution claims do not apply to trial judges because such judges hold single-member offices. The remedy of subdistricting is, therefore, inappropriate. The purpose of subdistricting is to ensure that the minority vote is not diluted; that is that minorities have a voice in the decision making process because they are able to elect a representative of their choice to speak for their views to an elected body. However, as noted by the Second Circuit Court of Appeals:

There can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.

Id. Thirty-seven of Florida's sixty-seven counties have only one county judge. Fla. Stat. § 34.022. The fact that in some counties and circuits several individuals hold office with the same title, "circuit judge" or "county judge," does not convert that office into a multimember office. Trial judges do not act together. Each judge has sole responsibility for the cases on his docket. Even in cases in which another judge is brought in to hear a portion of a case, for example pretrial motions, each judge makes the decisions on his portion of the case independently. Florida, like Texas, "has structured its government such that it wields judicial power at the trial level through trial judges acting separately, with a coterminous or linked electoral and jurisdictional base, each exercising the sum

of judicial power at that level." *LULAC*, 914 F.2d at 646 (Higginbotham, J., concurring).

The concurring opinion of Judge Higginbotham contained the argument that if judicial districts are divided into subdistricts minority litigants stand little chance of appearing before a judge who is responsive to their special concerns. *Id.* at 650. The dissent vehemently rejected the suggestion, implicit in the concurrence, that judges must be accountable to potential litigants. *Id.* at 667. However, subdistricting would not only diminish a minority voter's likelihood of appearing as a litigant before a judge in whose election the voter had some influence, subdistricting would greatly diminish the minority voter's influence over the judges who decide all cases. Minority voters will have influence over only a minute percentage of all cases decided. The vast majority of all cases will be decided by judges over whom a minority subdistrict voter holds absolutely no sway. This situation differs greatly from that of a true multimember office, such as a legislature, in which the candidate representing a minority has a voice in *all* decisions. Subdistricting in the elections of true multimember bodies ensures that the minority viewpoint will be represented in all decision making. Subdistricting in judicial elections, however, would operate to deprive the minority of a voice in most decisions because of the independence of each judge. As stated by one Eleventh Circuit Judge apparently opposed to subdistricting in all elections, subdistricting "serves those who would be candidates well, but it disserves the voters, who lose the opportunity to have a political impact upon and obtain political responsiveness from *all* candidates and elected officeholders."

United States v. Dallas County Commission, 850 F.2d 1433, 1444 (11th Cir. 1988) (Hill, J., concurring specially). Therefore, subdistricting in judicial elections is inappropriate and is not required by 42 U.S.C. § 1973.

CONCLUSION

Based on the foregoing, this Court should affirm the en banc decision of the Fifth Circuit Court of Appeals that section 2 of the Voting Rights Act does not apply to the election of trial judges.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1990

HOUSTON LAWYERS' ASSN., et al.,
Petitioners,
v.

ATTORNEY GENERAL OF TEXAS, et al.,
Respondents.

LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, et al.,
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v.

ATTORNEY GENERAL OF TEXAS, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit

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OF TENNESSEE, ET AL.
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, apply to dilution claims in the election of state court trial judges in multi-judge districts?

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No. 90-813 and No. 90-974

In The
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On Writ Of Certiorari
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AMICUS BRIEF OF THE STATES
OF TENNESSEE, ALABAMA, ARKANSAS, FLORIDA,
MICHIGAN, MINNESOTA, MISSOURI, MONTANA,
NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA,
PENNSYLVANIA AND WASHINGTON
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI STATES

The amici states have a definite and substantial interest in the outcome of this case. According to a 1988 survey of the National Center for State Courts, there are thirty-nine states¹ in which state court judges are elected at either the appellate or general trial jurisdiction court level of both. Knoebel, *The Voting Rights Act: Are Its Provisions Applicable to the Judiciary?*, 13 State Court Journal 24 (1989). Application of Section 2 of the Voting Rights Act of state judicial elections involving multi-judge districts at the trial and appellate levels could affect the selection process for such offices in each of the amici states.

A summary of the number of affected states and judges at each court level is as follows:

<u>COURT LEVEL</u>	<u>NUMBER OF STATES</u>	<u>NUMBER OF JUDGES</u>
Courts of Last Resort		
Statewide	28	191
Multi-Judge Districts	4	20

¹ The thirty-nine states are as follows: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

<u>COURT LEVEL</u>	<u>NUMBER OF STATES</u>	<u>NUMBER OF JUDGES</u>
Intermediate Appellate Court		
Statewide	14	134
Multi-Judge Districts	10	320
General Trial Court		
Statewide	1	72
Multi-Judge Districts	37	5638

Id. at 27.² According to the National Center for State Courts, the percentages of state court judge, who could be affected in each of the these categories, are as follows: courts of last resort – 62%; intermediate appellate courts – 59%; and general trial courts – 72%. *Id.* at 28.

Each of the amici states falls into one or more of the above mentioned categories. The impact of Section 2 of the Voting Rights Act upon the method by which the citizens of the amici states select their state judiciary is an important issue pertaining to the relationship between the federal government and the states. Congressional incursion into the affairs of a state so basic as the structure of a state's judiciary should be cautiously considered and permitted by the federal judiciary only when there is a "clear and unequivocal expression" by Congress to do so. The amici states are in a unique position to aid this Court in making a determination as to whether there is a "clear statement" of Congressional intent to apply Section 2 of the Voting Rights Act to the election of state court judges.

² A complete list of the states and each category of the chart is set forth in the appendix to this brief.

STATEMENT OF THE CASE

The amici states adopt the statement of the facts as presented by the panel opinion in *League of United Latin American Citizens Council v. Clements*, 902 F.2d 293 (5th Cir. 1990) (*LULAC*) along with the statement of the facts as presented by the respondent.

ARGUMENT

I.

SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT CONTAIN A CLEAR AND UNEQUIVOCAL EXPRESSION TO APPLY TO THE ELECTION OF STATE COURT JUDGES.

The issue in this case is whether state court judges are “representatives” within the meaning of results test in Subsection (b) of Section 2 of the Voting Rights Act. It is the position of amici states that state court judges are not “representatives”. Therefore, a claim that the election of state court judges in multi-judge districts “results” in the dilution of minority voting strength cannot be brought under Section 2 of the Voting Rights Act.

There are a number of sources upon which to rely in determining the applicability of Section 2 to the election of state court judges. These sources include: (1) rules of statutory construction, (2) legislative history and debates of the Voting Rights Act, (3) executive construction of the Voting Rights Act, and (4) judicial construction of other sections of the Voting Rights Act. In their brief, the *LULAC* petitioners rely upon the latter three sources

while ignoring the first. Petitioners' Brief, p. 16 (legislative history), p. 18 (construction by the Attorney General), and p. 14 (judicial construction of Section 5).

There is a rule of statutory construction which has particular relevance to the applicability of Section 2 to the election of state court judges. This Court has held that if Congress intends to alter the "usual constitutional balance between states and the federal government", then it must make its intention to do so "unmistakably clear in the language of the statute."³ *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242-43 (1985). Many of the recent cases which apply this principle involve immunity of states from suit under the Eleventh Amendment. *Dellmuth v. Muth*, 109 S.Ct. 2397 (1989) (Education of the Handicapped Act held not to abrogate the Eleventh Amendment); *Hoffman v. Connecticut Department of Income Maintenance*, 109 S.Ct. 2818 (1989) (Section 106 of the Bankruptcy Code did not abrogate the Eleventh Amendment); *Pennsylvania v. Union Gas Company*, 109 S.Ct. 2273

³ The purpose of requiring Congress to make a "clear statement" of applicability to a traditional state function is best stated in the following commentary:

By refusing to construe ambiguous legislation expansively, the Court can act to prevent Congress from avoiding hard questions of federal-state relations, and can thus increase the likelihood that Congress will give full attention to the interests of the states and of those groups whose interests parallel the states'.

Tribe, *American Constitutional Law* at 383 (1988).

(1989) (Comprehensive Environmental Response, Compensation and Liability Act of 1980 held to abrogate the Eleventh Amendment).

In addition, this rule of construction has been applied beyond the Eleventh Amendment context. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (preemption of historic police powers of the states must be "clear and manifest" by Congress); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981) (congressional intention to impose conditions on the grant of federal monies must be "expressly articulated"); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (where Congress conditions a state's receipt of federal funds, it must do so "unambiguously"). Most recently, this Court determined that neither a state nor a state official sued in his official capacity for money damages was a "person" within the meaning of 42 U.S.C. § 1983. *Will v. Michigan*, 109 S.Ct. 2304 (1989).⁴

The method by which each state's judiciary is selected is a fundamental part of a state's affairs. In many states, the method of selection of judges is set forth in the fundamental document organizing it, namely, the Constitution. See generally, *Constitutions of the United States: National and State* (June 1990) (Legislative Drafting

⁴ In the case of *Quern v. Jordan*, 440 U.S. 332 (1979), this Court held that Section 1983 did not abrogate the Eleventh Amendment. However, the Eleventh Amendment was not at issue in the *Will* case since the Section 1983 action was brought in state and not federal court. Nonetheless, this Court concluded that Congress did not provide a clear and unequivocal expression that states were intended to be persons within the meaning of 42 U.S.C. § 1983. *Will*, 109 S.Ct. at 2308.

Research Fund of Columbia University). Any congressional incursion into such an important state function must be clear and unequivocal. Otherwise, the delicate balance between state and federal relations will be unnecessarily tipped.

By applying this rule of statutory construction to Section 2 within the context of state court judge elections, a heavy burden is imposed upon the petitioners to show that Congress "clearly and unequivocally" intended Section 2 to apply to such elections. Thus, the issue is not just whether the Voting Rights Act might have been intended by Congress to apply to elections of state court judges, but whether Congress made a "clear and unequivocal expression" that Section 2 be applied to such elections.

The "results test" in Subsection (b) of Section 2 of the Voting Rights Act speaks in terms of a violation when "members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The normal and ordinary usage⁵ of the term "representative" means members of a legislative body not a judge. The dictionary definition of the term representative is "one that represents another or others in a special capacity as one that represents a constituency as a member of a legislative or governing body." *Webster's Third International Dictionary*, 1926 (1986).

⁵ This Court has held on numerous occasions that in construing statutes, the ordinary and normal meaning of words is to be utilized. *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985); *Aaron v. Securities and Exchange Commission*, 446 U.S. 680 (1980).

The function of a judge is not to represent a constituency in making decisions, but rather it is to interpret the law. As far back as our founding, that understanding of the function of the judiciary was expressed as follows:

Interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

Federalist Papers, No. 78 at 467 (1961). Likewise, this Court affirmed a holding that judges are not "representatives" within the context of the doctrine of "one person, one vote". *Wells v. Edwards*, 347 F.Supp. 453 (N.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973). See also, Cole, *The Voting Rights Act and the Election of Judges*, 14 Am. J. Trial Adv. 1 (Summer 1990).

It is also important to the amici states for this Court to consider Article IV, Section 4 of the Constitution, which provides that the United States "shall guarantee to every state in this union a republican form of government", in defining the parameters of the term "representative" within the context of Section 2. The amici states contend that the Guarantee Clause is intended to ensure that states are protected in the structuring of their governments as long as such governments are republican in form. A commentator best stated this argument as follows:

[T]here is an express provision that might possibly be invoked in support of the proposition that the Constitution recognizes in the National Government a duty, running directly "to every state of this union" rather than to individuals, to

respect the states most fundamental structural choices as to how its people are to participate in their governance: Article IV, Section 4 expressly provides that the "United States shall guarantee to every state in the union a republican form of government." . . .

No doubt both Congress and the federal judiciary are empowered under the Civil War amendments to assure that a state's choices of governmental structure respect basic norms of equal protection. And no doubt many options exist, consistent with those basic norms, for implementing the ideals of representative democracy through the requirement of "republican form". But the authority to chose among those options – the authority to decide consistent with equal protection of the laws, how one people will represent themselves and participate in their own governance – seems the very essence of all self-government.

Tribe at 398.

A republican form of government requires that those individuals who enact laws must be the popularly elected representatives of the people. See *Duncan v. McCall*, 139 U.S. 449 (1891) (The distinguishing feature of a republican form of government is the right of the people to choose their own officers for governmental administration and pass their own laws by virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.) On the other hand, a republican form of government does not require the popular election of its judiciary. U.S. Const., art. II, § 2 (members of the judiciary appointed by the President with the consent of the Senate). Likewise, judges in the state courts in this country are selected by a

number of different methods including: partisan elections, nonpartisan elections, gubernatorial appointments and legislative appointments.⁶

There is no dispute that states may chose to have their judges appointed by the governor or legislature and remain a republican form of government. Such an action would render the petitioners' claim moot since judges would no longer be elected. How can a judge be considered a "representative" of the people when his or her election by the people is not even required under the Guarantee Clause of the Constitution? In light of this analysis it is difficult to believe that the language of Section 2 contains a "clear and unequivocal" expression by Congress that the results test in Subsection (b) of Section 2 should apply to state judge elections.

Another point to consider is that raised by the American Judicature Society in its amicus brief, namely: the applicability of Section 2 of the Voting Rights Act to retention elections based upon merit selection.⁷ If one

⁶ Additionally, some states provide for a judicial merit selection panel to select a list of nominees from which a gubernatorial or legislative appointment is made subject to a retention election. Moreover, the following eleven states do not select their judiciary by popular election of any type: Connecticut, Delaware, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Virginia. A complete list of the methods by which states select their appellate and trial judges is set forth in the appendix of this brief.

⁷ The trend in recent years for the selection of state court judges is for a merit based selection process with a retention election. In fact, the following states elect one or more levels of

(Continued on following page)

follows the petitioners' argument to its logical conclusion, then retention elections for judges in multi-judge districts would be subject to Section 2 claims. Minority voters could potentially have a claim that their vote to retain or not retain judges in a particular district were diluted even though such judges were originally appointed under a merit based system and are not even opposed in the retention election.

Neither do the legislative debates surrounding the enactment of Section 2 provide any clear and convincing support for the applicability of that provision to the election of state court judges. All of the opinions of the Fifth Circuit, including the majority, concurring and dissent, relied upon the Congressional debates to bolster their positions. *League of United Latin American Citizens Council v. Clements*, 914 F.2d 620 at 628-29 (5th Cir. 1990) (en banc) (Gee, J., majority) at 639-42 (Higginbotham, J., concurring) at 656-58 (Johnson, J., dissenting). Yet, the best that can be said about the legislative debates with respect to the applicability of Section 2 to election of state judges is that they are inconclusive. Indeed, one commentator aptly stated the following:

Unfortunately for both proponents and opponents of permitting judicial election challenges under Section 2 of the Act, legislative history of Section 2 provides no real answers to its applicability. As noted by the *Mallory* and *Chisom* district courts, if Congress had intended

(Continued from previous page)

judges by that method: Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Pennsylvania, South Dakota, Tennessee, Utah, and Wyoming.

to include judicial elections and amended Section 2, it left no trace of such intent in the language of that section or in the Senate Report. Although the term "representatives" is used synonymously in the Senate Report with "candidates" and "elected officials", terms that clearly refer to elected judges, the term "political subdivisions" embraces judicial elections once. Elsewhere in the history, the term "political subdivisions" is defined without the inclusion of "judicial districts."

Woolcott, *State Judicial Elections and the Voting Rights Act: Will Section 2 Protect Minority Voters?*, 23 Ga. L. Rev. 787, 797 (1988). See also, *West Virginia University Hospital, Inc. v. Casey*, 59 U.S.L.W. 4180 at 4184 (1991) (when language of a statute is unambiguous, the Court will not permit the clear meaning to be expanded or contracted by statements of individual legislators or committees during the enactment process). Thus, the Congressional debates do not provide any basis for the conclusion that Congress intended by a "clear and unequivocal expression" to apply Section 2 to the election of state judges.

The LULAC petitioners argue that the Voting Rights Act should be construed very broadly to remedy "all discrimination in voting." Petitioners' Brief, p. 19. In this regard, the petitioners allude to the circumstances of the enactment of Subsection (b) of Section 2. In 1980, this Court ruled in *Mobile v. Bolden*, 446 U.S. 55 (1980) that a claim under the Voting Rights Act required a finding of discriminatory intent to prove a vote dilution case. In 1982 Congress amended the Voting Rights Act in response to that decision by adding Subsection (b) of Section 2 to eliminate the intent requirement by explicitly imposing only a "results" test. From these circumstances,

the petitioners conclude "[i]t is inconceivable that Congress, while trying to strengthen Section 2, would at the same time have excluded from its reach an entire category of elections without someone saying so in the extensive legislative debates, the committee hearings, or the committee reports." Petitioners' Brief, p. 17.

Such an argument ignores the previously discussed rule of statutory construction that before Congress alters its usual constitutional balance between states and the federal governments it must make its intention to do so in unmistakably clear language in the statute. Similar arguments were raised by the petitioners in the *Will* case with respect to whether a state is a "person" within the meaning of 42 U.S.C. § 1983. While acknowledging that 42 U.S.C. § 1983 "provides a federal forum to remedy many deprivations of civil liberties," this Court in *Will* held that there was not a "clear and unequivocal expression" in either the language or the legislative history of § 1983 to indicate that states or state officials sued in their official capacity for money damages were intended to be "persons" within the meaning of that statute. *Will*, 109 S.Ct. at 2308. Likewise, before Congress reaches into such a fundamental area of state domain, such as the selection of state's judiciary, it must do so in a "clear and unequivocal manner."

The amici states do not dispute the fact that the Voting Rights Act is a constitutional method of enforcing the Fifteenth Amendment to ensure that all persons have the opportunity to vote in a free and fair manner. See *City of Rome v. United States*, 446 U.S. 156, 181 (1980). However, just as the Fifteenth Amendment was intended to protect voting rights, the Fourteenth Amendment was intended

to protect civil rights. Yet any incursion into state sovereignty vis-à-vis the enforcement of the Fourteenth Amendment through Congressional action must be "clear and unequivocal." This Court in the *Will* case held that 42 U.S.C. § 1983 was not such a "clear and unequivocal" expression of Congressional intent to intrude upon state sovereignty. Likewise, such a "clear statement" does not exist with respect to the applicability of Subsection (b) of Section 2 to the election of state court judges in multi-judge districts.

II.

TRIAL COURT JUDGES IN MULTI-JUDGE DISTRICTS ARE SINGLE MEMBER OFFICES NOT SUBJECT TO VOTE DILUTION CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT.

The focus of amici states in this brief is the applicability of Subsection (b) of Section 2 of the Voting Rights Act to the election of state court judges. An additional argument raised by the respondents is that trial level judges are single member offices; therefore, the election of trial level judges in multi-judge districts does not violate Section 2 of the Voting Rights Act because there can be no dilution of minority voting strength since such judges are single member offices. The amici states agree with that position as an alternative to the main argument raised by the amici states in this brief. Such arguments have been fully raised by the respondents in their brief and Judge Higginbotham in his concurring opinion in this case. *LULAC*, 914 F.2d at 634 (Higginbotham, J., concurring). Therefore, the amici states see no need to provide any additional arguments on that point.

CONCLUSION

Based upon the foregoing authorities and analysis, the amici states urge this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit and hold that Section 2 of the Voting Rights Act does not apply to the election of state court judges.

Respectfully submitted,

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APPENDIX

App. 1

**SURVEY OF STATES WHERE JUDGES ARE ELECTED
IN MULTI-JUDGE GEOGRAPHICAL AREAS*
COURT OF LAST RESORT/JUSTICES
ELECTED STATEWIDE**

Alabama	Minnesota	Pennsylvania
Alaska	Missouri	South Dakota
Arizona	Montana	Tennessee
Arkansas	Nebraska	Texas
Colorado	Nevada	Utah
Georgia	New Mexico	Washington
Idaho	North Carolina	West Virginia
Iowa	North Dakota	Wisconsin
Kansas	Ohio	Wyoming
Michigan	Oregon	

(29 states, 191 judgeships)

**COURT OF LAST RESORT/MULTI-JUDGE
ELECTION DISTRICTS**

Illinois:	1 district,	2 justices
Louisiana:	1 district,	2 justices
Oklahoma:	2 districts,	7 justices
Mississippi:	3 districts,	9 justices

**INTERMEDIATE APPELLATE COURT/JUDGES
ELECTED STATEWIDE**

Alabama	Iowa	Oregon
Alaska	Kansas	Pennsylvania
Colorado	Minnesota	Tennessee
Georgia	New Mexico	Utah
Idaho	North Carolina	

**INTERMEDIATE APPELLATE COURT/MULTI-JUDGE
ELECTIONS DISTRICTS**

Arizona:	Both divisions	(18 judges)
Illinois:	All 5 districts	(34 judges)
Louisiana:	All 5 districts	(48 judges)
Michigan:	All 6 districts	(18 judges)

App. 2

Missouri:	All 3 districts	(29 judges)
Ohio:	All 12 districts	(58 judges)
Oklahoma:	All 6 districts	(12 judges)
Texas:	All 14 districts	(80 judges)
Washington:	3 of 9 districts	(10 judges)
Wisconsin:	All 4 districts	(13 judges)

**GENERAL JURISDICTION COURT/JUDGES
ELECTED STATEWIDE**

North Carolina (72 judges)

**GENERAL JURISDICTION COURT/MULTI-JUDGE
ELECTION DISTRICTS**

Alabama:	31 of 39 circuits	(116 judges)
Alaska:	All 4 districts	(29 judges)
Arizona:	10 of 15 counties	(96 judges)
Arkansas:	21 of 24 districts	(57 judges)
California:	42 of 58 counties	(708 judges)
Colorado:	21 of 22 districts	(109 judges)
Florida:	All 20 circuits	(362 judges)
Georgia:	44 of 45 circuits	(134 judges)
Idaho:	All 7 districts	(33 judges)
Illinois:	All 22 districts, although 5 counties, have only 1 resident judge each	(775 judges)
Indiana:	51 of 93 counties	(168 judges, both superior and circuit court)
Iowa:	All 14 districts	(142 judges)
Kansas:	29 of 31 districts	(145 judges)
Louisiana:	36 of 42 districts	(183 judges)
Maryland:	15 of 24 districts	(100 judges)
Michigan:	29 of 55 circuits	(170 judges)
Minnesota:	All districts	(224 judges)
Mississippi:	Chancery, 13 of 20 districts	(32 judges); circuit, 14 of 20 districts (34 judges)
Missouri:	16 of 44 circuits	(275 judges)
Montana:	9 of 20 districts	(25 judges)
Nebraska:	11 of 21 districts	(39 judges)
Nevada:	7 of 9 districts	(33 judges)
New Mexico:	12 of 13 districts	(58 judges)

App. 3

New York:	Supreme, 12 of 12 districts (84 judges); county, 25 of 58 counties (80 judges)
North Dakota:	All 7 districts (26 judges)
Ohio:	81 of 88 counties (332 judges)
Oklahoma:	11 of 26 districts (56 judges), although each county has an associate district judge
Oregon:	17 of 20 districts (84 judges)
Pennsylvania:	47 of 67 counties (310 judges)
South Dakota:	All 8 circuits (37 judges)
Tennessee:	All 31 districts (128 judges)
Texas:	Unknown (although 197 of 375 judge- ships are being contested in the law- suit)
Utah:	4 of 8 districts (25 judges)
Washington:	23 of 30 districts (32 judges)
West Virginia:	23 of 30 circuits (53 judges)
Wisconsin:	41 of 72 counties (177 judges)
Wyoming:	8 of 9 districts (16 judges)

* Knoebel, *The Voting Rights Act; Are Its Provisions Applicable to the Judiciary*, 13 State Court Journal 24 (1989).

SELECTION METHODS FOR STATE COURT JUDGES*

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
ALABAMA			
TRIAL: Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Criminal Appeals	Partisan election	Partisan election	Gubernatorial app.
Court of Civil Appeals	Partisan election	Partisan election	Gubernatorial appt.
ALASKA			
TRIAL: Superior Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

App. 5

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
ARIZONA			
TRIAL			
Superior Court	Gubernatorial appt. from judicial nominating commission in 2 counties; partisan election in others	Retention election in 2 counties, partisan election in others	See full term
APPELLATE			
Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

App. 6

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
ARKANSAS			
TRIAL:			
Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
Chancery & Probate Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt. until 12/31 following next general election then partisan election to fill remainder term
Court of Appeals	Partisan election	Partisan election	Gubernatorial appt. until 12/31 following next general election then partisan election to fill remainder term

App. 7

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
CALIFORNIA			
TRIAL: Superior Court	Nonpartisan election	Retention election	Gubernatorial appt.
APPELLATE: Supreme Court	Gubernatorial appt.	Retention election	Gubernatorial appt.
Courts of Appeal	Gubernatorial appt.	Retention election	Gubernatorial appt.
COLORADO			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
CONNECTICUT			
TRIAL: Superior Court			
	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating comm.)
APPELLATE: Supreme Court			
	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating comm.)
Appellate Court	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating commission)	Legislative appt. (Governor recommends from judicial nominating comm.)

App. 9

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
DELAWARE			
TRIAL: Court of Chancery	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate
Superior Court	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate	Gubernatorial appt. from judicial nominating comm. with consent of Senate

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
DISTRICT OF COLUMBIA			
TRIAL: Superior Court	Presidential appt. from judicial nominating comm. with confirmation by Senate	Judicial nominating commission or Pres. appt. with Senate confirmation	See full term
APPELLATE: Court of Appeals	Presidential appt. from judicial nominating commission with confirmation by Senate	Judicial nominating commission or Pres. appt. with Senate confirmation	See full term

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
FLORIDA			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	Gubernatorial appt. from judicial nominating commission
District Court of Appeal	Gubernatorial appt. from judicial nominating commission	Retention election	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
GEORGIA			
TRIAL: Superior Court	Nonpartisan election	Nonpartison election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
HAWAII			
TRIAL: Circuit Ct. of Family Ct.	Gubernatorial appt. from judicial nominating commission with consent of Senate	Judicial nominating commission reappointment	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission with consent of Senate	Judicial nominating commission reappointment	See full term
Intermediate Ct. of App.	Gubernatorial appt. from judicial nominating commission with consent of Senate	Judicial nominating commission reappointment	See full term

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
IDAHO			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. may be from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. may be from judicial nominating commission
ILLINOIS			
TRIAL: Circuit Court	Partisan election	Retention election	Court selection
APPELLATE: Supreme Court	Partisan election	Retention election	Court selection
Appellate Court	Partisan election	Retention election	Court selection

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
INDIANA			
TRIAL:			
Superior Court	Partisan election	Retention election	Supreme Court appt. until gubernatorial appt. for remainder of term or until next general election
Circuit Court	Retention election	Partisan election	Supreme Court appt. until gubernatorial appt. for remainder of term or until next general election
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Tax Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
IOWA			
TRIAL:			
District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
KANSAS			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission in 17 districts; partisan election in 14 districts	Retention election in 17 districts; partisan election in 14 districts	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
KENTUCKY			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
LOUISIANA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Supreme Ct. selection
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Supreme Ct. selection
Courts of Appeal	Nonpartisan election	Nonpartisan election	Supreme Ct. selection
MAINE			
TRIAL: Superior Court	Gubernatorial appt.	Gubernatorial appt.	Gubernatorial appt.
APPELLATE: Supreme Judicial Court	Gubernatorial appt.	Gubernatorial appt.	Gubernatorial appt.

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
MARYLAND			
TRIAL: Circuit Court	Gubernatorial appt. from judicial nominating commission followed by partisan election	See full term	See full term
APPELLATE: Court of Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission with consent of Senate
Court of Special Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission with consent of Senate

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
MASSACHUSETTS			
TRIAL:			
Trial Ct. of Commonwealth	Gubernatorial appt. from judicial nominating commission with approval of Governor's Council	See full term	See full term
APPELLATE:			
Supreme Judicial Court	Gubernatorial appt. from judicial nominating commission with approval of Governor's Council	See full term	See full term
Appeals Court	Gubernatorial appt. from judicial nominating commission with approval of Governor's Council	See full term	See full term

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
MICHIGAN			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Nonpartisan election (Partisan primary)	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
MINNESOTA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
MISSISSIPPI			
TRIAL: Circuit Court	Partisan election	Partisan election	Gubernatorial appt. from judicial nominating comm. until next general election
Chancery Court	Partisan election	Partisan election	Gubernatorial appt. from judicial nominating comm. until next general election
APPELLATE: Supreme Court	Partisan election	Partisan election	Gubernatorial appt. from judicial nominating committee

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
MISSOURI			
TRIAL: Circuit Court	Gubernatorial appt. from judicial nominating commission in counties with nonpartisan election (5 metropolitan circuits)	Retention election for 5 metropolitan circuits, partisan election in 39 counties	Gubernatorial appt. in partisan cir. (39)
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
MONTANA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Workers Compensation Court	Gubernatorial appt. from judicial nominating commission	Gubernatorial appt. from judicial nominating commission	Gubernatorial appt. from judicial nominating commission
Water Court	Chief Justice appt. from judicial nominating commission	Chief Justice appt. from judicial nominating commission	Chief Justice appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election (if unopposed, retention election)	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
NEBRASKA			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
NEVADA			
TRIAL: District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
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NEW HAMPSHIRE**TRIAL:**

Superior Court	Gubernatorial appt. subject to approval by Executive Council	See full term	See full term
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APPELLATE:

Supreme Court	Gubernatorial appt. subject to approval by Executive Council	See full term	See full term
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**NEW
JERSEY****TRIAL:**

Superior Court	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate
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APPELLATE:

Supreme Court	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate	Gubernatorial appt. with consent of Senate
Superior Ct., App. Div.	Chief Justice appt. of Superior Court Judge	Gubernatorial reappt. with consent of Senate	Chief Justice appt. of Superior Ct. Judge

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
NEW MEXICO			
TRIAL: District Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Appeals	Partisan election	Partisan election	Gubernatorial appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
NEW YORK			
TRIAL:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
County Court	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
APPELLATE:			
Court of Appeals	Gubernatorial appt. from judicial nominating commission with consent of Senate	Gubernatorial reappt.	Gubernatorial appt.
App. Divs. of Sup. Ct.	Gubernatorial appt. from list of Supreme Court justices	Gubernatorial reappt.	Gubernatorial appt.
App. Terms of Sup. Ct.	SCA appt. from lists of Supreme Court justices	SCA reappointment	SCA appt. from lists of Sup. Ct. Justices

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
NORTH CAROLINA			
TRIAL:			
Superior Court	Partisan election (resident judges) Gubernatorial appt. (special judges)	Partisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Appeals	Partisan election	Partisan election	Gubernatorial appt.
NORTH DAKOTA			
TRIAL:			
District Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE:			
Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission or election

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
OHIO			
TRIAL: Court of Common Pleas.	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
OKLAHOMA			
TRIAL: District	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Retention election	See full term	Gubernatorial appt. from judicial nominating commission
Court of Criminal Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
OREGON			
TRIAL:			
Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Tax Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.

State and their Courts	Method of selection for full term	Method of retention	Method of selection to fill unexpired term
PENNSYLVANIA			
TRIAL: Court of Common Pleas	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate
APPELLATE: Supreme Court	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate
Superior Court	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate
Commonwealth Court	Partisan election	Retention election	Gubernatorial appt. from judicial nominating commission with consent of Senate

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
RHODE ISLAND			
TRIAL: Superior Court	Gubernatorial appt. confirmed by Senate	N/A	Gubernatorial appt. confirmed by Senate
APPELLATE: Supreme Court	Legislative election	See full term	Legislative election
SOUTH CAROLINA			
TRIAL: Circuit Court	Legislative election	Legislative re-election	Legislative election
APPELLATE: Supreme Court	Legislative election	Legislative re-election	Legislative election
Court of Appeals	Legislative election	Legislative re-election	Legislative election

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<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
SOUTH DAKOTA			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Retention election	See full term	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
TENNESSEE			
TRIAL:			
Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
Chancery Court	Partisan election	Partisan election	Gubernatorial appt.
Criminal Court	Partisan election	Partisan election	Gubernatorial appt.
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt.
Court of Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission
Court of Criminal Appeals	Retention election	See full term	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
TEXAS			
TRIAL:			
District Courts	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
APPELLATE:			
Supreme Court	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
Court of Criminal Appeals	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate
Courts of Appeals	Partisan election	Partisan election	Gubernatorial appt. with consent of Senate

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
UTAH			
TRIAL: District Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Retention election	See full term
APPELLATE: Supreme Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Retention election	See full term
Court of Appeals	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Retention election	See full term

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
VERMONT			
TRIAL:			
Superior Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Legislative election	See full term
District Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Legislative election	See full term
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission with Senate confirmation	Legislative election	See full term
VIRGINIA			
TRIAL:			
Circuit Court	Legislative appt.	Legislative reappt.	Legislative appt.
Supreme Court	Legislative appt.	Legislative reappt.	Legislative appt.
Court of Appeals	Legislative appt.	Legislative reappt.	Legislative appt.

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
WASHINGTON			
TRIAL: Superior Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt.
WEST VIRGINIA			
TRIAL: Circuit Court	Partisan election	Partisan election	Gubernatorial appt.
Supreme Court of App.	Partisan election	Partisan election	Gubernatorial appt.

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
WISCONSIN			
TRIAL: Circuit Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
APPELLATE: Supreme Court	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission
Court of Appeals	Nonpartisan election	Nonpartisan election	Gubernatorial appt. from judicial nominating commission

<u>State and their Courts</u>	<u>Method of selection for full term</u>	<u>Method of retention</u>	<u>Method of selection to fill unexpired term</u>
WYOMING			
TRIAL:			
District Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term
APPELLATE:			
Supreme Court	Gubernatorial appt. from judicial nominating commission	Retention election	See full term

* *State Court Organization 1987*, Tables 7 and 20 (1988) (National Center for State Courts) (the original tables contain footnotes explaining exceptions to the method of selection of judges in certain states which are not included in this Appendix for simplification purposes).

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In The
Supreme Court of the United States
October Term, 1990

LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, et al.,

Petitioners,

v.

MATTOX, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of
Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE AND
BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT
OF RESPONDENTS, MATTOX, ET AL.

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No. 90-974

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MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT
OF RESPONDENTS, MATTOX, ET AL.

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully moves this Court for leave to file the attached amicus curiae brief in support of respondents, Mattox, *et al.* Consent to the filing of this brief has been granted by counsel for petitioners, Jesse Oliver, *et al.*, and has been lodged with the Clerk of this Court. Respondents, Mattox, *et al.*, and petitioners, League of

United Latin American Citizens, *et al.*, have withheld their consent, thus necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization, incorporated under the laws of California, formed for the purpose of engaging in litigation in matters affecting the public interest. The Foundation has over 20,000 supporters and contributors throughout the United States, many of whom reside in areas potentially subject to the issue in this case. For this reason, the Foundation submits that it can add a broader perspective to this case which would aid the Court.

PLF believes that the federal government has broad authority under the Constitution and various statutes to eliminate racial discrimination. However, local governments should be restricted by this federal power only when circumstances compel such restriction and only when the facts justify it. Intrusion on the basic processes of localities can be justified by no less. In this particular case, the Fifth Circuit Court of Appeals has held that Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(2)(b), does not apply to judicial elections. The petitioners would have the judicial election scheme at issue here, which is without discriminatory purpose, trigger the broad remedial powers of the Court in dismantling a judicial election system that has served Texas for over a century, thereby subjecting a state's basic political processes to federal interference. This result is justified neither by precedent nor by common sense.

PLF's public policy perspective and litigation experience in the Voting Rights Act arena will provide an additional viewpoint with respect to the issues presented. PLF's brief focuses on the twin concepts of the independence of the judiciary and eradication of bias in the judiciary. Examination of The Federalist Papers and the rules of diversity and removal jurisdiction demonstrates the importance of impartial, rather than representative, judges. None of the parties in this action have taken this approach to the issue, yet the arguments are relevant to the disposition of this case.

PLF participated in an earlier Voting Rights Act case before this Court, *Rome v. United States*, 446 U.S. 156 (1980) (a Section 5 case dealing with municipal annexations), and is submitting an amicus brief in *Chisom v. Roemer* concurrent with this brief. PLF believes the Fifth Circuit correctly analyzed the holdings of this Court and lower courts which exclude judges from the term "representatives."

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: April 1, 1991.

Respectfully submitted,

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No. 90-974

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INTERESTS OF AMICUS CURIAE

The interests of amicus curiae are set forth in the
preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *League of United Latin American Citizens v. Clements*, 914 F.2d 620 (5th Cir. 1990). The case concerned the at-large election of Texas trial court judges. The court held that when Congress amended the Voting Rights Act to add a results test for dilution of minority voting strength in elections for "representatives," it did not intend the amendment to apply to judicial elections.

INTRODUCTION

The stated goal of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(2), is to prevent racial discrimination at the polls so that minorities can "elect *representatives* of their choice." *Id.* (emphasis added). The term "representatives," as used in Section 2, should be limited to state officials who make law, and not extended to those who interpret it. Judges do not represent the special interests of any constituency and certainly not the special interests of any racial group. Their function is to administer justice fairly, efficiently, and impartially for all. States have never drawn judicial districts so as to recognize the special interests of any group of citizens in the community.

The function of courts is to ensure equal protection under the law and due process for all. Judicial election schemes are tailored to serve those ends. If judges are held to be "representatives," the interlocking web of jurisdiction, venue, docket control, jury venire, and

accountability of judges to their electorate is subordinated to the notion that the special interests of minority voters should be given particular attention. *Clark v. Edwards*, 725 F. Supp. 285, 294 (M.D. La. 1988), *vacated by Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990), *probable jurisdiction for appeal noted by Clark v. Roemer*, 59 U.S.L.W. 3496 (Jan. 18, 1991). Petitioners have not explained what special interests of minority voters require "representation" in the judiciary or in what way the elected judiciary fails to respond to minority interests.

The application of Section 2 to judicial elections has the potential for a tremendous impact on many states' electoral systems. Remedial measures resulting from such application may force the invalidation of judicial electoral systems. Such invalidation substitutes judicial judgment for that of the citizens as to what their forms of government should be. By doing so, federal courts will overstep the boundaries mandated by federalism. Congress did not extend Section 2 to *all* electoral practices and systems but only to the election of *representatives* from multi-member districts.

Elections for representatives in which vote dilution has been shown can be cured by redistricting under the one-man, one-vote principle. In the case of elections for representatives, such a cure does not destroy the function of the office, invalidate the system, or infringe other constitutional rights or guarantees. On the other hand, these evils may well come to pass as a result of redistricting in the judicial election context.

SUMMARY OF THE ARGUMENT

Section 2(b) of the Voting Rights Act (Act), which permits use of a "results test" to prove violation of the Act, applies only to the election of representatives. Judges, whether at the trial level, appellate level, or the court of last resort, are not representatives. They do not have a constituency, do not necessarily reflect the views of those who elect them, and should not.

The linchpin of the American judiciary is the impartiality of its judges. Litigants must abide by decisions whether they agree with them or not. By requiring judges to "reflect," "be responsive to," or "represent" a discrete constituency, the impartiality that is crucial to the administration of justice is lost. Far from representing a particular group of people, the judiciary is meant to be the antimajoritarian branch of government. Equating the judiciary with the truly representative branches of government destroys the check the judiciary has over those branches.

The state and federal courts have long been wary of any appearance of bias in their ranks. The creation of diversity jurisdiction came about in an effort to aid litigants who might suffer from local prejudices. Removal jurisdiction exists for the same reason. With all the federal courts have accomplished to eradicate bias, this Court should not take a step backward by connecting judges inextricably to their electors.

Many states elect judges on a district-wide basis. The reasons for this are numerous and sound. They include geographical compactness, administrative control, and a

correlation with venue statutes. The expansion of Section 2(b) to judicial elections would devastate the judicial election systems in these states; states in which no intentional discrimination has occurred. This Court should respect the boundaries set by federalism and continue to permit states to elect their own judiciary by their own preference.

ARGUMENT

I

VOTING RIGHTS ACT § 2(B) IMPLEMENTED A "RESULTS TEST" WHICH APPLIES ONLY TO "REPRESENTATIVES" AND JUDGES ARE NOT "REPRESENTATIVES"

By dividing a county into subdistricts, a federal court dramatically alters an elected judge's independence and appearance of impartiality. Rather than enjoying the independence that accompanies accountability to the entire electorate, he would be rendered beholden to a small portion of those appearing before the court. Rather than being free to eradicate a nuisance in his neighborhood, the judge may be pressured to allow that nuisance to continue if he intends to remain in office.

A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group

An elector has no guarantee that a civil suit or criminal prosecution involving him will be brought before a judge he voted for. In fact, chances are much greater that a litigant or defendant will be brought before a judge

with whom he has no connection whatsoever. That lack of connection is the linchpin of impartial justice. The American judicial system relies on citizens to abide voluntarily by court rulings, whether or not they agree or disagree with such rulings. It is therefore of fundamental importance that the judges handing down the rulings be perceived as being fair and unbiased.

Although petitioners seek subdistricting to improve judges' responsiveness to minorities, creating subdistricts will not have the same impact on minority representation as it has in legislative elections. In legislative and administrative elections, officials are elected from a political subdivision to represent their constituents. The elected officials become part of a political decision-making body, such as a city council, school board, or legislature. Elected representatives form a collegial body charged with the responsibility of making decisions that reflect the policy preferences of their constituents. In the legislative/administrative context, single-member district elections ensure racial and language minority groups in the district do not suffer vote dilution. However, in judicial districts, even in districts with two or more judges, District Court judges do not act as a group. Each judge is responsible for a specific proportion of the caseload. Judges do not negotiate, discuss, compromise, or engage in give-and-take when deciding cases. Each judge acts alone in applying the law to the case at hand.

Subdistricting robs judges of their independence by focusing a very narrow public opinion over their decision-making process. Do petitioners really want judges responsive to public opinion in their districts? Public opinion is an uncertain and constantly shifting

barometer of community emotion. Public opinion gives little consideration to the determinations of law and fact at issue in a case. Public opinion is concerned solely with results. Certainly, most judges set aside concern for their reelection standing and render decisions without regard for such considerations. However, a party on the losing side of a court decision or ruling affecting life, liberty, or property should not be left to wonder whether that decision or ruling was influenced by public opinion and prospects for reelection.

B. The Judiciary Performs an Antimajoritarian Role

The Framers of the Constitution intended judges and legislative representatives to be treated differently under the law. These officials are provided for in different articles in the body of the Constitution. U.S. Const. Arts. I and III. Further, the difference between legislative representatives, who curry favor with their constituents, and judges, who do not, is accentuated by the Framers' recital of the duties and prohibitions of the respective offices. The executive and legislative branches are subject to an elaborate system of rules while the judiciary is not. The plain meaning of the word "representative" cannot be strained to encompass judges, who simply do not have a constituency. Judges, be they trial or appellate, should apply the law as they see it, without a political agenda or interest.

Alexander Hamilton, in a sequence of Federalist Papers, stressed the importance of an independent judiciary. Far from equating judicial officers with "representatives," he expressed concern that the judiciary be free

from the "encroachments and oppressions" of the representative body. The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). The independent judiciary was held up to be "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." *Id.*

Not only was the judicial branch created to be non-representative, but Hamilton asserted that " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " *Id.* at 466 (quoting Montesquieu, *Spirit of Laws*, Vol. 1, at 186 (1750)). Furthermore, Hamilton was fully aware of the ever-changing whims of public opinion. Hence, the antimajoritarian role of the judiciary is clear:

"[I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the . . . Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body." *Id.* at 469-70.

Hamilton cautioned strongly against allowing an independent judiciary to be infiltrated by a sense of responsiveness to segments of the community. It is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community. *Id.* at 470.

Necessarily, judges' decisions may not reflect the majority will. Their decisions often must enforce constitutional guarantees in the face of majority opposition. To fulfill this role, judges should be motivated solely by principle, not by perceived ties to constituents.

"Few of us would want an electorate that thought there were no differences at all between judging and political activity. To erode the perception of this distinction is dangerous; it risks result-oriented adjudication independent of any satisfactory rule structure The continuing perception of an institution of electing or removing judges may over time weaken the idea that adjudication ordinarily is sharply different from doing politics."¹

A judge should never have to worry that an unpopular decision alone will cast him out of the judiciary.

C. Federal Rules Have Provided Great Protection Against Any Possibility of Bias

The creation of diversity jurisdiction and the ability of defendants to remove cases to federal court are based on the concern that local litigants could benefit from a hearing before a local judge. The Federalist Papers Nos. 80 and 81 emphasize this point: "[J]udicial authority of the Union ought to extend to . . . cases . . . in which the State tribunals cannot be supposed to be impartial and unbiased." The Federalist No. 80, at 475 (A. Hamilton). This is necessary because "the most discerning cannot

¹ Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. Cal. L. Rev. 1555, 1559 (1988).

foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of natural causes." The Federalist No. 81, at 486 (A. Hamilton).

The historical basis of diversity jurisdiction was to protect nondomiciliaries from local prejudice. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979), cert. denied, 444 U.S. 1098, reh'g denied, 445 U.S. 947 (1980). The theory on which jurisdiction is conferred on federal courts in controversies between citizens of the different states has its foundation in the supposition that the state tribunal may not be impartial between its own citizens and nonresidents. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856).

At one time the removal jurisdiction statute, 28 U.S.C. § 1441, expressly listed local bias as a reason for removal. 28 U.S.C.A. § 1441, historical note. All of the provisions with reference to removal because of the inability, due to prejudice or local influence, to obtain justice, have since been discarded. The historical note to Section 1441 explains that "[t]hese provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." *Id.* So much has been done to eradicate biases; the subdistricting of judicial election districts is a swing in the wrong direction.

"Representative judges" would encourage forum shopping, as litigants would use whatever means at their disposal to obtain a judge from a part of the county with views similar to their own. One of the major purposes of

this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937), was to eliminate or drastically curtail the evil of forum shopping. *Id.* at 74-75. The twin aims of the *Erie* rule were characterized by this Court as "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). The *Hanna* decision viewed *Erie* as a reaction to the practice of forum shopping that developed in the wake of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Hanna*, 380 U.S. at 467. See *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (diversity jurisdiction existed although plaintiff reincorporated solely to create diversity); see also *O'Brien v. Avco Corp.*, 425 F.2d 1030, 1036 (2d Cir. 1969) (administrator was appointed to secure a federal forum because of alleged prejudice in state court; federal court viewed appointment "as a blatant example of precisely the type of forum-shopping that [the anti-collusion statute] and cases like *Erie R.R. Co. v. Tompkins* . . . were designed to prevent").

No right exists for litigants to vote on the particular judges who may hear their cases. As it is now, citizens are often in court in civil or criminal cases in jurisdictions where they do not live or vote, yet none has ever been able to challenge a judge's authority because the citizen had no opportunity to vote for that judge.

II

THE IMPACT OF EXPANDING VOTING
RIGHTS ACT § 2(B) TO JUDICIAL
ELECTIONS WOULD BE DEVASTATING
TO THE MANY STATES THAT ELECT
JUDGES ON A COUNTY-WIDE BASIS

Texas' use of the county-wide election system ensures that each district judge is elected by and accountable to every citizen of the county. Each judge has jurisdiction over cases arising anywhere in the county. Venue over each case is county-wide. The relevant community for jury selection is the county. Specialized courts and docket-equalization procedures are exercised county-wide.

Electing state district judges from single-member districts would destroy the integrity of the unit. Decision making would become fragmented along the same lines as the districts into which the unit is carved. The judge would not reflect values of the whole community. Judicial elections are unique compared to elections for legislative and administrative offices. Judicial elections are distinguished by lower levels of turnout and voter roll-off, less competition and greater reliance by the voters on factors such as incumbency, previous judicial experience, and party affiliation in making choices among competing candidates. Weber, *The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective*, 73 *Judicature* 85, 86 (1989). Thus, this Court should exercise caution in reaching conclusions about voter polarization and dilution in judicial elections based on past experience with elections for legislative and executive offices.

Minorities have already challenged state judicial election systems in Georgia, Illinois, Alabama, North Carolina, Ohio, Mississippi, and Florida² in addition to the Texas and Louisiana cases currently before this Court. Each state that elects judges has its own method of doing so, be it by county-wide elections, by district, or some other method. California, like Texas, elects judges on a county-wide basis. If Section 2 is applied to judicial elections in Texas and Louisiana, the trend would undoubtedly spread to California. Consider the County of San Francisco. The result of splitting up that county would result in small, homogenous constituencies, *e.g.*, the Haight-Ashbury District, the Marina District, and the Nob Hill District. These subdistricts, which would be smaller and contain fewer voters than the existing districts, would intolerably exacerbate political pressures on judges.

In Texas, judges in certain counties run for a particular bench (*e.g.*, civil, criminal, family, or juvenile). Texas established that system because it permits campaigning candidates to declare their qualifications for the particular bench they seek. Supplemental Brief of Appellant Dallas County Criminal District Judge F. Harold Entz, at 6, *League of United Latin American Citizens (LULAC) v.*

² *Brooks v. Glynn County, Georgia, Board of Elections*, 1989 WL 180759 (S.D. Ga. 1989); *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988); *Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1988); *Alexander v. Martin*, 86-0148-CIV-5 (E.D. N.C. 1987); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); and *AlHakim v. State of Florida*, 88-14165-CIV-T-10"A" (M.D. Fla. 1988).

Dallas County District Judge F. Harold Entz, in the United States Court of Appeals for the Fifth Circuit, No. 90-8014. Remedial measures imposed by federal courts to cure a Section 2 violation may totally rework the state system to such an extent that state citizens no longer even recognize the system their elected state representatives established. In a case where no intentional discrimination exists, a federal court should not dramatically alter a state system. Wholesale changes or intrusive alterations of the nature and operation of a state's judicial branch violates the principles of federalism.

CONCLUSION

To ascribe particular sets of views to judges because of the color of their skin is clearly in error. Yet the petitioners here seem to believe that only a member of a minority group will be responsive to the interests of that group. If this Court determines that state judicial elections are subject to Section 2, and if single-member or smaller multi-member judicial districts, some with majority black populations, are created as a remedy, then state court judges will be held accountable, as "representatives," to a smaller, more ethnically and racially homogeneous population.

Requiring judges to be "representatives" insults not only the judges who sit on the state and federal benches, but the entire electorate. To hold, in effect, that a black litigant is more likely to receive a sympathetic ear from a black judge, who will not ignore minority interests, *Thornburg v. Gingles*, 478 U.S. 30, 48 n.14 (1986), impugns

the integrity of both black and nonblack judges. Judges of all races, creeds, and colors are presumed to be impartial; presumed to decide cases on the merits, not on the color or political persuasion of the litigants. Moreover, the judges composing the entire judiciary of a state is far from homogenous in philosophy, political leanings, and view of the law and its application. Therefore, the exemption that Congress carved out of the Voting Rights Act for judicial elections should be upheld, and the Fifth Circuit's opinion should be affirmed.

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Respectfully submitted,

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